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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-171

STATE OF LOUISIANA,

Petitioner,

v.

JOHN C. SAWHILL
~~WILLIAM E. SIMON~~, *et al.*,

Respondents.

Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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WILLIAM E. SIMON, *et al.*,

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Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

To the Honorable Warren E. Burger, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, State of Louisiana, prays that a Writ of Certiorari issue to review the Judgment of July 26, 1974 and the Opinion of August 12, 1974 rendered by the Temporary Emergency Court of Appeals of the United States in the proceedings entitled *People of the State of California, et al (State of Louisiana, Intervenor) v. William E. Simon, et al.*

OPINIONS BELOW

The judgment of the Temporary Emergency Court of Appeals (App., pp. 32a) and the opinion of the Temporary Emergency Court of Appeals (App., pp. 33a, *et seq.*) are as yet unreported. Likewise, the opinion (App., pp. 1, *et seq.*) and the judgment (App., pp. 29a, *et seq.*) of the District Court are as yet unreported. Judgment of the Court of Appeals was entered July 26, 1974.

JURISDICTION

The basis for federal jurisdiction in the Court of the first instance is Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, which incorporates by reference Sections 205-211 of the Economic Stabilization Act of 1970, as amended. Suit was instituted in the United States District Court for the Central District of California by the State of California, *et al.*, against William E. Simon, then Administrator of the Federal Energy Office, and other government officials, seeking to have state-owned crude oil declared exempt from price controls. The State of Louisiana intervened on the side of plaintiffs. The District Court essentially granted the relief prayed for by plaintiffs and defendants appealed to the Temporary Emergency Court of Appeals, which reversed the District Court and ordered judgment in favor of defendants. The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

I. Whether or not the FEO rule of February 21, 1974 removing the exemption enjoyed by state and local governments with respect to price controls of crude oil was valid.

II. Whether or not the FEO rule of February 21, 1974 could be effective prior to March 23, 1974.

III. Whether or not the retroactive features of the FEO rule of February 21, 1974 are valid.

IV. Whether or not the findings of fact of the District Court were unjustifiably overturned by the Court of Appeals.

V. Whether or not the FEO proceedings of March 13, 1974 served to cure the defects of the February 21, 1974 rule.

STATEMENT OF THE CASE

During a period commencing prior to August 6, 1973, and ending on December 4, 1973, the power to regulate charges and prices for materials and property, including crude oil, which was vested in the President under the Economic Stabilization Act,[1] was delegated to the Cost of Living Council. Under the Phase IV rules and regulations adopted by the Cost of Living Council during this period, prices and charges by state and local governments for such materials and property, including crude oil, were exempt. Said exemption was set forth in 6 CFR Sections 150.54(a)(2) (38 F.R. 21601, August 9, 1973) and 150.54-(f)(2) (38 F.R. 22119, August 16, 1973), contained in the Phase IV price regulations.

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[1] P.L. 92-210, 85 Stat. 743.

On October 25, 1973, the Cost of Living Council issued a notice of proposed rule making (38 F.R. 29618-29619, October 26, 1973). Said notice specified an intent to eliminate the state and local governmental exemption with regard to crude oil and other petroleum products and stated specifically that: "All comments received by November 24, 1973, will be considered by the Council before final action is taken on the proposed regulation" and further described November 24, 1973 as the "ending date for comment."

The Emergency Petroleum Allocation Act of 1973[2] was passed by the Congress and approved by the President on November 27, 1973. Pursuant to this act, the President, by executive order dated December 4, 1973,[3] established the Federal Energy Office, transferring from the Cost of Living Council to the Federal Energy Office the pricing authority with respect to crude oil and other petroleum products.

Pursuant to the Petroleum Allocation Act, proposed regulations were promulgated by the Federal Energy Office on December 11, 1973,[4] which proposed regulations adopted by reference the pricing provisions of the Cost of Living Council, thus continuing in effect the state and local exemption with regard to crude oil.

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[2] P.L. 93-159, 87 Stat. 627.

[3] Executive Order 11748. (38 F.R. 33575, December 6, 1973).

[4] 38 F.R. 34414, *et seq.*, December 13, 1973.

Regulations were then adopted pursuant to said proposal of December 11, 1973 by the Federal Energy Office on December 27, 1973.[5] The pricing provisions were adopted precisely as proposed and the state and local exemption was thus formally adopted and approved by the Federal Energy Office.

Then on January 14, 1973, the Federal Energy Office revoked the above regulations of December 27, 1973 and issued new regulations.[6] These regulations specifically provided that: "Prices charged for any sale, lease or lease-sale of a covered product by State and local governments are exempt." This section retained, in express language, the state and local governmental exemption theretofore contained in the rules and regulations issued by the Cost of Living Council and the Federal Energy Office.

Without further notice of any kind, the Federal Energy Office, on February 21, 1974, issued an amendment to the regulations,[7] revoking the state and local exemption retroactively to October 25, 1973.

On March 5, 1973, the Federal Energy Office issued a notice of public hearing,[8] giving notice that the FEO was to hold a public hearing in Washington, D.C. on Wednesday, March 13, 1974 to receive comments from interested persons on whether or not the FEO should reconsider its amendment which withdrew the state and local exemption.

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[5] 39 F.R. 744, January 2, 1974.

[6] 39 F.R. 1924, *et seq.*, January 15, 1974.

[7] 39 F.R. 7176-77, February 25, 1974.

[8] 39 F.R. 8996, March 7, 1974.

Purportedly acting on the proceedings which occurred on March 13, 1973 in Washington, D.C., the Federal Energy Office on April 2, 1974 issued more rules and regulations wherein it was stated that the FEO had decided to sustain with slight change its February 21, 1974 amendment, reconfirming its position removing the state and local exemption and also at that time, removing the exemption in favor of the federal government.[9] Moreover, the April 2 ruling apparently purports to retain the retroactive feature of the February 21 amendment, relating back to October 25, 1973, with certain exceptions not here pertinent.

REASONS FOR GRANTING THE WRIT

It is submitted that the Temporary Emergency Court of Appeals erred in reversing the decision of the United States District Court for the Central District of California and in so doing rendered a decision in conflict with other decisions of other federal Courts of Appeals and of the United States Supreme Court. Moreover, the case involves an important state question as well as an important question of federal law which has not been, but should be settled by this Court, all within the contemplation of Rule 19(1)(b) of the rules of this Honorable Court.

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[9] 39 F.R. 12252, April 4, 1974.

ARGUMENT

I.

THE FEO RULE OF FEBRUARY 21, 1974 IS INVALID

The FEO failed to comply with the notice provisions of the Administrative Procedure Act in issuing its February 21, 1974 regulation.

The Administrative Procedure Act (5 USCA §553[b]) requires that notice of proposed rule making be published in the Federal Register. In compliance therewith, the Cost of Living Council issued its notice of proposed rule making on October 25, 1973, stating the closing dates for comments would be November 24, 1973.

The rules and regulations of the FEO promulgated on February 21, 1974 were not preceded by a notice of proposed rule making as required by the Administrative Procedure Act. It is the position of the FEO that the notice of October 25, 1973 was all the notice required. If this position were to be sustained, then it would appear that an administrative agency could issue one notice of proposed rule making and then issue rules based on that notice for months and even years thereafter, a result which could of course not be sanctioned. In removing the exemption, after having first retained it, the FEO did not afford petitioner fair notice of exactly what it intended to do and afford a reasonable opportunity to oppose the action, as required by the Court in *Ann Arbor Railway Co. v. United States.*[10] In other words, the State of Louisiana had reasonably concluded that the rule making process was at an

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[10] 358 F. Supp. 933 (E.D. Pa., 1973).

end with respect to the exemption, as of January 14, 1974, and therefore made no opposition to the February 21 rule removing the exemption. In fact, the State of Louisiana, following the January 14 rule retaining the exemption, had notified its lessees that payments of royalties should be made to the State of Louisiana based on the exempt price. (Affidavit of Joseph E. Berrigan, Jr., R. 139-145). As pointed out in Mr. Berrigan's affidavit, during the critical period between January 14 and February 21, 1974, there appeared no need for the states to take further action and thus no reason for the State of Louisiana to attempt to apprise itself of possible positions taken by those who were aggrieved by the retention of the state and local exemption. The State was confident that no further rule making would take place without the publication of a notice of proposed rule making. The manner in which the exemption was removed had the effect of depriving the State of Louisiana of the all important right to submit comments in favor of the retention of the exemption and to request a hearing. The procedure adopted by the FEO was not in compliance with the Administrative Procedure Act, as required by law, but was indeed a rule making procedure of its own invention. See *National Labor Relations Board v. Wyman-Gordon Co.*,[11] *Gonzalez v. Freeman*,[12] and *Berends v. Butz*.[13] Also, in *Texaco, Inc. v. Federal Power Commission*,[14] the Court stated that when an administrative agency is exercising its legislative function,

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[11] 394 U.S. 759, 89 S. Ct. 1426 (1969).

[12] 334 F.2d 570 (D.C. Cir., 1964).

[13] 357 F. Supp. 143 (D. Minn., 1973).

[14] 412 F.2d 740 (3rd Cir., 1969).

it must follow the procedures laid down in order for the rules to have the force of law. The Court held that the notice requirements of §553(b) should have been but were not complied with and that the failure to comply was not a minor or insignificant matter.

It is the position of the State of Louisiana that the notice of October 25, 1973 was no longer viable when the FEO issued its rule of February 21, 1974. In view of all that transpired subsequent to the notice issued by the Cost of Living Council on October 25, 1973, it is difficult to accept the argument that such notice could have served as a compliance with the aforementioned notice requirement of the Administrative Procedure Act in connection with the FEO's regulation of February 21, 1974. Following the notice of October 25, 1973, FEO issued its proposed rules and regulations on December 11, 1973 and adopted said proposals on December 27, 1973. Then again on January 14, 1974 rules and regulations were issued by the FEO specifically stating in §212.52 as follows:

> "(b) *State and local governments.* Prices charged for any sale, lease or lease-sale of a covered product by State and local governments are exempt."[15]

Moreover, as pointed out by the District Court, the summary which preceded the January 14 regulations stated " . . . no specific future changes are currently anticipated . . . ."[16] If the October 25 notice of the Cost of Living Council could serve as the basis of a rule promulgated by the FEO, then surely such notice was acted upon by the

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[15] 39 F.R. 1952, January 15, 1974.

[16] 39 F.R. 1924, January 15, 1974.

January 14 regulation retaining the state and local exemption. How could it be effectively argued that the October 25 notice somehow skipped the January regulations and served as a notice for the subsequent February 21 regulations? The reason for the notice is to afford interested parties an opportunity to participate in the rule making process. Under the total circumstances, the State of Louisiana acted reasonably in concluding that any rule making predicated upon the notice of October 25, 1973 was at an end as of January 14, 1974. Thus, the February 21 rule removing the exemption was issued without proper notice and was therefore clearly invalid.

II.

EVEN IF VALID, THE FEO RULE OF FEBRUARY 21, 1974 CANNOT BE EFFECTIVE PRIOR TO MARCH 23, 1974

The FEO rule of February 21, 1974 failed to comply with the applicable provisions of the Administrative Procedure Act in yet another important particular.

Section 207 of the Economic Stabilization Act of 1970 states that the administrative procedure provisions of Title 5 of the United States Code (The Administrative Procedure Act) are inapplicable with the exception of Sections 552, 553 and 555(e). Section 553 relates to rule making and, as discussed above, requires that a notice of proposed rule making be published in the Federal Register. An exemption to this relates to those cases in which the particular involved agency finds for good cause that notice is impractical, unnecessary or contrary to the public interest and incorporates such a finding in a statement for the

reasons thereof in the rules issued. This was not done in this particular instance so the exception does not apply.

5 U.S.C.A. §553(d) states that the required publication of a rule (not of the notice of a proposed rule) shall be not less than thirty (30) days before its effective date. In other words, a rule cannot be effective until thirty (30) days after the rule itself has been published in the Federal Register. This section of the Administrative Procedure Act therefore rejects as a general proposition rule making on a retroactive basis. Therefore, even assuming the validity of the February 21 FEO rule, it could not have become effective before thirty (30) days later, or on March 23, 1974. An exception to this relates to a ruling granting an exemption. The rule in question does not grant an exemption but rather seeks to remove an exemption. Another exception applies where the agency provides otherwise for good cause found and published in the rule. Here again, this was not done. Thus, the thirty (30) day requirement is applicable in all respects to FEO's February 21, 1974 regulation. The rule provided that it would be effective from and after 9:00 A.M., Eastern Standard Time, October 25, 1973, but did not state that good cause had been found to ignore the thirty (30) day requirement nor were any such findings published with the rule as required by §553(d)(3). Thus, it would appear clear that the February 21, 1974 rule could not be effective prior to March 23, 1974. The thirty (30) day requirement was recognized and enforced in *Lewis-Mota v. Secretary of Labor,*[17] *Universal Specialties, Inc. v. Blount*[18] and in *Kelly v. U.S. Department of Interior.*[19]

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[17] 469 F.2d 478 (2nd Cir., 1972).

[18] 331 F. Supp. 52 (C.D. Ca., 1971).

[19] 339 F. Supp. 1095 (E.D. Ca., 1972).

III.

EVEN IF THE RULE IS VALID, THE RETROACTIVE FEATURE OF THE FEBRUARY 21, 1974 RULE IS INVALID

It is the position of the State of Louisiana that the retroactive feature of the February 21 regulation is invalid. The rule making process by its very nature is prospective and not retrospective. An administrative agency acts both as a Court and as a law making body. In adjudicating disputes, and thus acting as a Court, the agency's decisions are in a sense retroactive and must sometimes be of necessity in order for the agency to properly carry out its functions. However, this is not true with respect to its rule making functions.

In the case of *Securities & Exchange Commission v. Chenery Corp.*,[20] the Supreme Court stated:

> "Since the Commission, unlike a court, does have the ability to make new law *prospectively* through the exercise of its rule-making powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct within the framework of the Holding Company Act." (Emphasis added).

The above constitutes a clear recognition that rule making is prospective even though adjudication may be retrospective. Also, in *Arizona Grocery Co. v. Atchison T&SF Railway Co.*,[21] the Court rejected an attempt by the ICC to apply a change in the regulations on a retroactive basis.

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20 332 U.S. 194, 67 S.Ct. 1575, 1580 (1947).

21 284 U.S. 370, 52 S.Ct. 183 (1932).

The plaintiff brought suit seeking reparation on rates paid by plaintiffs to defendants with respect to shipments which moved under rates approved or prescribed by the Interstate Commerce Commission. Subsequent to the shipments, the rates were lowered by the ICC and the ICC allowed reparation to the plaintiffs. The defendants asserted that they should not be required to pay reparations on shipments which moved under rates approved or prescribed by the Commission as reasonable. To this, the Commission replied:

> "We reserve the right, upon a more comprehensive record, to modify our previous findings, upon matters directly in issue before us as to which it clearly appears that our previous findings would not accord substantial justice under the laws which we administer."

However, the Court stated that the Commission could not ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it had prescribed. It was bound to recognize the validity of the rule of conduct prescribed by it, and not to repeal its own enactment *by retroactive effect.* The Court stated that the Commission could indeed repeal the order as it affected *future* action, and substitute a new rule of conduct as often as the occasion might require, but this was the limit of its power and it could not be done retroactively. In finding for the carrier, this Court stated:

> "Where the Commission has upon complaint, and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact

> situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate."

On this issue of retroactivity, we respectfully refer the Court to *N.L.R.B. v. Majestic Weaving Co.*,[22] wherein the Court stated:

> "There has been increasing expression of regret over the Board's failure to react more positively to the Supreme Court's rather pointed hint, SEC v. Chenery Corp., 332 U.S. 194, 202, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947), that since an administrative agency has 'the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason [than a court] to rely upon *ad hoc* adjudication to formulate new standards of conduct,' and that the 'function of filling in the interstices' of regulatory statutes 'should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.' "

See also *N.L.R.B. v. E & B Brewing Co.*[23] The cases reflect, as stated above, that an administrative agency, *in the course of its adjudicatory process*, may make a ruling which has a retroactive effect. However, this is subject to review by the courts, and in some instances the courts have set aside the retroactive aspect of the ruling on the

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[22] 355 F.2d 854, 860 (2nd Cir., 1966).

[23] 276 F.2d 594 (6th Cir., 1960).

grounds that it caused prejudicial error. However, with respect to the agency's rule-making function, its actions are prospective and not retrospective. As was stated in Davis, *Administrative Law Treatise*, Section 5.08, p. 340:

> "Since legislative rules are merely the administrative counterpart of statutes, the argument is plausible that legislative rules may be retroactive whenever a statute may be retroactive, since the fairness or unfairness is the same and judicial ideas of fairness are decisive. But agencies have no powers except those conferred and power to issue retroactive rules is not easily implied. State courts readily hold that retroactive rate orders are invalid for lack of statutory authority. And courts are less reluctant to upset mere administrative regulations than to upset statutes. Because retroactivity is not favored, a reasonable initial view is that retroactive rules should be tolerated only when specifically authorized by statute."

The District Court's opinion cited with approval the preceding quotation from Mr. Davis' treatise. The Supreme Court denied retroactive effect to a Defense Department regulation governing the payment of claims in *Greene v. United States.*[24]

There is some authority, as discussed by the lower Court's opinion, for the proposition that certain agency rules may be retroactively applied under certain circumstances. However, any decision as to whether or not the rule should be applied retroactively should be based on a consideration of the following factors: (1) Whether or not

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[24] 376 U.S. 149, 84 S.Ct. 615, 11 L.Ed.2d 576 (1964).

the rule was a matter of first impression; (2) Whether or not it represented an abrupt departure from a well-established practice and was not an attempt to merely fill a void in an unsettled area of law; (3) The extent to which the party against whom the new rule in applied relied on the former rule; (4) The degree of the burden which a retroactive order imposes on a party; and (5) the statutory interests in applying a new rule despite the reliance of a party on the old standard.[25] In considering these factors, the lower Court specifically found (1) that the February 21, 1974 amendment was not a matter of first impression but rather a change of a rule under which the parties had been acting and on which they had relied since its adoption by the Federal Energy Office. We might add that this had also been the rule under the Cost of Living Council, which had obviously considered the question in granting the exemption initially. Thus, the matter was clearly not one of first impression. (2) The lower Court found that the withdrawal of the exemption represented an abrupt departure from a well established practice and was not merely an attempt to fill a void in an unsettled area of law. This finding was amply supported by the facts and the legislative history. (3) The lower Court found that each of the plaintiffs had entered into contracts for the sale of crude oil involving millions of dollars in reliance upon the state and local governments' exemption. The State of Louisiana had notified its lessees that it should be paid royalties on the basis of the exempt price. This was certainly in reliance upon the existence of the state and local governments' exemption. (4) The lower Court found that the states and local governments had included in their

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[25] *Retail, Wholesale and Department Store Union, AFL-CIO v. N.L.R.B.*, 466 F.2d 380 (D.C. Cir., 1972).

budget revenue from the sale of crude oil at prices determined in reliance upon the exemption. According to the affidavit of Mr. Berrigan (R. 139-145), certain royalties were indeed paid to the State of Louisiana on the basis of the exempt price and placed in the State's general fund. Also, additional severance taxes were collected based on a percentage of the exempt price. Once such funds are collected and placed in the general fund, severe and very complex legal consequences arise. It would take an act of the legislature to recover such funds from the general fund. We urge the Court to study carefully the affidavit of Mr. Berrigan, which reflects the unfairness of the entire proceedings. (5) The lower Court found that there was no strong compelling statutory interest in applying the new rule retroactively and that the continuance of the exemption might well permit additional expenditures by state and local governemnts for increased oil production, one of the objectives of the Emergency Petroleum Allocation Act of 1973. The Court further stated that "whatever statutory interests there may be, they do not counterbalance the inequity of retroactive application of FEO's amendment."

It is submitted that the general rule is that rule making is not applied retroactively. If there is to be an exception to this, then it would clearly seem that the burden of proving the exception would be upon the agency which attempts to make a retroactive ruling. The evidence in this respect falls far short of establishing sufficient considerations, as outlined above, for retroactive application.

IV.

THERE WAS NO BASIS FOR THE OVERTURNING OF THE DISTRICT COURT'S FINDINGS OF FACT

It is of course hornbook law that the findings of fact of the district judge may not be overturned so long as there is evidence to support such findings, even though the Court of Appeals may not have made such findings based upon the evidence or may have made different findings. The lower Court made the following findings of fact (R. 176):

* * *

> "18. Relying on the apparent intent of the Federal Energy Office to adopt by reference the pre-existing state and local exemption set forth in Part 150 of Title 6 of the Code of Federal Regulations, plaintiffs, plaintiff in Intervention, and each of them, deemed it unnecessary to comment upon Part 201 of said proposed regulations relating to pricing."

* * *

> "26. Events occurred between November 24, 1973, the ending date for comment on the notice of proposed rule making of October 25, 1973, and February 21, 1974, which events could have had a significant effect upon the nature and thrust of any comments which could have been made as of the earlier date."

* * *

> "29. The proceedings described in Finding No. 28 (the April 4, 1974 action of the FEO) did

not in law or in fact cure the invalidity of the amendment of February 21, 1974, . . ."

The above findings of fact amply support the decision of the lower Court in setting aside and declaring invalid the February 21 rule removing the exemption. Moreover, there is ample evidence in the record to support these findings of fact, including but not limited to the affidavit of Mr. Berrigan, *supra*. There was therefore no legal basis for the appellate Court's apparent review of the facts and a substitution of its appreciation of the facts in place of the findings of the trial Court.

V.

THE PROCEEDINGS OF MARCH 13, 1974 DID NOT CURE THE DEFECTS

With respect to the so-called hearing on March 13, 1974, it can hardly be said that this served to cure the prior defects in the procedure adopted by the FEO. As is pointed out in the affidavit of Joseph E. Berrigan, Jr., insufficient time was allowed the states to prepare and present a meaningful presentation. Such a preparation would assuredly have included consultation with economists and other experts and a compilation of considerable factual data, requiring weeks of preparation.

The March 1974 "hearing" was not designed to hear meaningful evidence in a fair and impartial attempt to weigh and balance all the pertinent factors and do the equitable thing in conformity with the objectives of the program. It was nothing more than a recognition by FEO of its failure to comply with significant procedural safeguards and an attempt to circumvent same upon the showing of a belated, token compliance therewith.

Provided the states had received adequate notice and time to properly prepare their cases, who knows what action the FEO would have taken at the so-called hearing in March? The states did not, as FEO well knows, "fully" participate. There was simply an inadequate amount of time given to fully participate. Even if this position of the FEO were correct, which is emphatically denied, this still did not cure the original defect in its actions. At best for the FEO, this would only enable it to enforce its rule after March 5, 1974, the date of the notice of the so-called "hearing." If the March proceedings were not rule making proceedings, which FEO has previously admitted, then to this date the FEO has failed to issue a valid regulation removing the exemption.

CONCLUSION

The actions of the FEO which are the subject of this litigation constitute an attempt by FEO to "replace the statutory scheme with a rule making procedure of its own invention."[26] The FEO failed to comply with procedural safeguards required by the Administrative Procedure Act. Thus, its regulations, pursuant to which it has attempted to remove state and local governments' exemption from certain price controls, are null and void.

The findings of the lower Court are not clearly erroneous and should have been affirmed.

In the alternative, the regulations adopted by FEO should not be given retrospective application.

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[26] *N.L.R.B. v. Wyman-Gordon Co., supra.*

As stated by the Court of Appeals:[27]

> ". . . This is an important case. The parties have sought expedited oral argument . . ."
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> "The amount in controversy which is the difference between the controlled and uncontrolled prices for state and local government sales of crude oil is increasing at the rate of $1.2 million per day. The legal uncertainty surrounding these payments is injurious to the interests of all parties as well as third party small independent refiners who have accrued potential liabilities to the states. (Order of July 26, 1974, from the bench.)"

It is submitted that the amount involved and the importance of the issues presented more than justify the issuance of writs of review.

We might point out at this time that under the provisions of Section 211(g) of the Economic Stabilization Act, a petition for a writ of certiorari must be filed within thirty days from the entry of the judgment of the Temporary Emergency Court of Appeals. On July 26, 1974, that Court entered its judgment and order reversing the District Court, stating that a written opinion would follow. Therefore, petitioner's thirty day delay began to run on July 26, 1974 but the opinion of the Court was not received until August 15, 1974. A Petition for Rehearing was filed by plaintiffs and petitioner in TECA on August 9, 1974, but upon receipt of TECA's opinion on August 15, 1974, the State of Louisiana elected to withdraw its Petition for Rehearing and proceed with this Petition for Writ of Certiorari. However, the State of California and

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[27] Page 10 of opinion of Temporary Emergency Court of Appeals, footnote 17.

other plaintiffs chose to follow through with their petitions for rehearing in TECA. As of this writing, no action has been taken by TECA on those petitions for rehearing, although early action by the Court is expected. Therefore, it is suggested that because of the foregoing procedural situation, this Honorable Court may find it appropriate to delay ruling on this petition until such time as TECA has decided the pending petitions for rehearing and other parties to this litigation have filed petitions for writs of certiorari, all of whom are vitally interested in the ultimate and final outcome of this litigation.

Because of previous commitments requiring counsel for Petitioner to be out of his office during the week of August 19, coupled with the requirement that this petition be printed, there was little time to incorporate in the petition an analysis of the opinion of the Court of Appeals and wherein it erred. It is therefore respectfully submitted that petitioner should be granted the privilege of filing a supplemental brief in the spirit of Rule 24(5) of this Honorable Court.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should in due course be granted.

EDGAR F. BARNETT
Camp, Carmouche, Palmer,
Carwile & Barsh
P.O. Drawer 2001
Lake Charles, Louisiana 70601

Counsel for Petitioner,
State of Louisiana

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Petition for a Writ of Certiorari to United States Supreme Court, on behalf of the Petitioner, State of Louisiana, have been served on all parties by depositing same in United States mail, postage prepaid, and addressed to their respective counsel of record. In accordance with Rule 33(2)(a) of this Court, copies have also been served by mail upon the Solicitor General, Department of Justice, Washington, D.C. 20530.

LAKE CHARLES, LOUISIANA: August 23, 1974.

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EDGAR F. BARNETT

ENTRY OF APPEARANCE

To the Clerk of The United States Supreme Court:

In accordance with Rule 33 of this Honorable Court, please enter my appearance in this action as attorney for Petitioner, State of Louisiana.

Dated: August 23, 1974.

EDGAR F. BARNETT
Camp, Carmouche, Palmer,
Carwile & Barsh
P.O. Drawer 2001
Lake Charles, Louisiana 70601
Attorneys for Petitioner

APPENDIX "A"

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, et al.,	)	
Plaintiffs,	)	CV-74-661-JWC
vs.	)	OPINION
WILLIAM E. SIMON, etc., et al.,	)	
Defendants.	)	

In this action the plaintiffs, subsequently joined by the intervenor, are seeking to enjoin the Administrator of the Federal Energy Office from putting into effect and enforcing an amendment to regulations adopted by the Federal Energy Office on February 21, 1974. This amendment purports to terminate retroactively state and local agencies' exemption from regulation in respect to prices charged for crude oil. A temporary restraining order having been heretofore issued, the matter now comes before this court on an application for a preliminary injunction. The parties, however, have agreed that this case may be submitted to the court for final judgment on all issues.

FACTS

Under Phase IV of the regulations promulgated under the Economic Stabilization Act of 1970[1] state and local governments were exempt from price controls insofar as they relate to crude oil production.[2] On October 23, 1973, the Cost of Living Council, acting under the Economic Stabilization Act issued a Notice of Proposed Rule

Making[3] proposing to amend Title 6 of the Code of Federal Regulations so as to terminate state and local exemption retroactively to the date of the notice. This notice specified that the ending date for comment on the proposed rule was November 24, 1973. The State of California and the City of Long Beach filed comments opposing said rule and the State sought a formal hearing. However, no further action was taken pursuant to this notice by the Cost of Living Council.

On November 27, 1973, the President approved the Emergency Petroleum Allocation Act of 1973,[4] which specifically required the President to promulgate and adopt new regulations relating to the mandatory allocation and pricing of crude oil. Pursuant to this authority conferred upon the President, he, by Executive Order,[5] created the Federal Energy Office and delegated to it the authority to issue regulations contemplated by the Petroleum Allocation Act of 1973.

On December 27, 1973, the Federal Energy Office adopted regulations which incorporated into Title 10 of the Code of Federal Regulations the pricing provisions (including the state and local exemption) previously set forth in Phase IV of the price regulations adopted by the Cost of Living Council.[6]

By regulations adopted January 14, 1974,[7] the Federal Energy Office made substantial changes in its regulations previously adopted December 27, 1973. These changes included the adoption of 10 C.F.R. Part 212, which set forth in full pricing provisions applicable to crude oil and other petroleum products. Section 212.52(b) expressly stated that "Prices charged for any sale, lease or lease-sale of a covered product [including crude oil] by State and

local governments are exempt." The summary preceding the January 14 regulations stated ". . . no specific future changes [in the regulations] are currently anticipated. . . ."[8]

On February 21, 1974, the Federal Energy Office, purporting to act pursuant to the Notice of Proposed Rule Making issued by the Cost of Living Council, revoked the state and local exemption, retroactive to October 25, 1973, the date of the notice.[9]

It is plaintiffs' position that the defendants may revoke the state and local exemptions only by issuing a new notice and the holding of such hearings as are contemplated by the regulations. Accordingly, they contend that the order of February 21, 1974, is a nullity and, in any event, cannot be applied retroactively. I agree.

The Federal Energy Office, once established, took what it wanted from the Cost of Living Council, republished regulations as its own which kept the exemption, and also stated that there was no present intention of changing the regulations. Those actions terminated the rule making proceedings begun by the October 25, 1973, notice.

If, following termination of the rule making proceedings under the October 25, 1973 notice, the Federal Energy Office desired to change the regulations, it should have proceeded in accordance with §553 of the Administrative Procedure Act (5 U.S.C. §553) for this section is made expressly applicable to Federal Energy Office rule making by the Emergency Petroleum Allocation Act of 1973. In pertinent part this section requires that notice of proposed rule making shall be published in the Federal Register; that the required publication be made not less than 30 days before the effective date of a rule; and that after the notice required by this section, the agency shall give interested

persons an opportunity to participate in the rule making through submission of written or oral data, views and arguments. The revocation of the state and local exemption on February 21, 1974, constituted rule making within the meaning of this section and cannot be upheld because of its obvious failure to comply with the administrative procedure requirements.

We come now to the question of whether the action of the Federal Energy Office of February 21, 1974, amending its regulations to eliminate the exemption, even if otherwise valid, can be given retroactive effect. I hold that it cannot.

Although an administrative agency in the course of its judicatory process may make a ruling which has a retroactive effect, the courts have been most reluctant to apply retroactively agency pronouncements made as a part of their rule making function. The courts in most instances have given only prospective application to such action. In this connection, the following discussion appears in Davis, Administrative Law Treatise, §5.08 at 340-41 (1958).

> "Since legislative rules are merely the administrative counterpart of statutes, the argument is plausible that legislative rules may be retroactive whenever a statute may be retroactive, since the fairness or unfairness is the same and judicial ideas of fairness are decisive. But agencies have no powers except those conferred and power to issue retroactive rules is not easily implied. State courts readily hold that retroactive rate orders are invalid for lack of statutory authority. And courts are less reluctant to upset mere administrative

> regulations than to upset statutes. Because retroactivity is not favored, a reasonable initial view is that retroactive rules should be tolerated only when specifically authorized by statute." [footnotes omitted]

In *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2nd Cir., 1966) Judge Friendly, speaking on the issue of retroactivity, stated:

> "There has been increasing expression of regret over the Board's failure to react more positively to the Supreme Court's rather pointed hint, SEC v. Chenery Corp., 332 U.S. 194, 202, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947), that since an administrative agency has 'the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason [than a court] to rely upon *ad hoc* adjudication to formulate new standards of conduct,' and that the 'function of filling in the interstices' of regulatory statutes 'should be performed, as much as possible, through this quasi-legislative promulation of rules to be applied in the future.' [Citations omitted]" [Footnotes omitted]

So, in *Arizona Grocery Company v. AT&SF Ry. Co.*, 284 U.S. 370, 52 S.Ct. 183 (1932), the Court rejected an attempt by the I.C.C. to apply a rate change retroactively. In *Retail, Wholesale and Department Store Union, AFL-CIO v. N.L.R.B.*, 466 F.2d 380, 390 (D.C. Cir. 1972), the court, denying retroactive force to a newly adopted administrative rule, stated:

> ". . . and courts have not infrequently declined to enforce administrative orders when in their view the inequity of retroactive application has not been counterbalanced by sufficiently significant statutory interests. [Citations omitted]"

The court, then, proposed certain guidelines which should be considered in determining if an administrative agency rule should be retroactively applied.

> "Among the considerations that enter into a resolution of the problem are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard." *Id.*

Applying these tests to the facts presented here (1) the February 21, 1974, amendment was not a matter of first impression, it was a change of a rule under which the parties had been acting and on which they had relied since its adoption by the Federal Energy Office. (2) It represents an abrupt departure from a well established practice, and does not merely attempt to fill a void in an unsettled area of law. (3) Each of the plaintiffs in this action has entered into contracts for the sale of crude oil involving millions of dollars in reliance upon the state and local

governments' exemption. (4) Each of the plaintiffs has included in its budget revenue from the sale of crude oil at prices determined in reliance upon the exemption which revenue, presumably, has either been partially expended or committed. And (5) there is no strong compelling statutory interest in applying the new rule retroactively. The continuance of the exemption may well permit additional expenditures by the plaintiffs for increased oil production, which is one of the objectives of the Emergency Petroleum Allocation Act of 1973. Whatever statutory interests there may be, they do not counterbalance the inequity of retroactive application of FEO's amendment.

The application for preliminary and permanent injunction is hereby granted. Attorneys for the plaintiffs will prepare findings of fact, conclusions of law and judgment.

DATED: May 1, 1974.

/s/ Jesse W. Curtis
JESSE W. CURTIS
United States District Judge

FOOTNOTES

[1] Economic Stabilization Act of 1970, Pub. L. 91-379, 84 Stat. 799, as amended, 12 U.S.C.A. §1904 note.

[2] 6 C.F.R. §150.54, 38 Fed. Reg. 21601 (1973).

[3] The notice of proposed rule-making is at 38 Fed. Reg. 29618 (1973).

[4] Pub. L. 93-159, 87 Stat. 627.

[5] Executive Order 11748, 38 Fed. Reg. 33575 (1973).

[6] Dec. 27 regs.: 39 Fed. Reg. 744 et seq. (1974).

[7] Jan. 14 regs.: 39 Fed. Reg. 1924 et seq. (1974).

[8] 39 Fed. Reg. 1924 (1974).

[9] Feb. 21, 1974 regs.: 39 Fed. Reg. 7176 (1974).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the State Lands Commission, CITY OF LONG BEACH, a California Municipal Corporation, and CITY OF NEWPORT BEACH, a California Municipal Corporation, *Plaintiffs,* and STATE OF LOUISIANA, *Plaintiff in Intervention,* v. WILLIAM E. SIMON, JOHN C. SAWHILL, WILLIAM N. WALKER, WILLIAM C. ARNTZ, THE ADMINISTRATOR OF THE FEDERAL ENERGY OFFICE, THE DEPUTY ADMINISTRATOR OF THE FEDERAL ENERGY OFFICE, THE CHIEF COUNSEL OF THE FEDERAL ENERGY OFFICE, and THE REGIONAL ADMINISTRATOR, REGION 9, OF THE FEDERAL OFFICE OF OIL AND GAS, *Defendants.*	No. CV 74-661-JWC FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on duly and regularly for hearing on preliminary injunction, trial on the merits, and hearing on motion to dismiss, on April 22, 1974, in Courtroom 10 of the above entitled Court, before the Honorable Jesse W. Curtis, Judge Presiding, without a

jury. Plaintiff, the People of the State of California, acting by and through the State Lands Commission, appeared by Evelle J. Younger, Attorney General of California, by Jay L. Shavelson, Assistant Attorney General, Warren J. Abbott, Deputy Attorney General, and Richard A. Haft, Deputy Attorney General. Plaintiff, City of Long Beach, appeared by Leonard Putnam, City Attorney of Long Beach, by Harold A. Lingle, Deputy City Attorney and Robert W. Parkin, Deputy City Attorney. Plaintiff City of Newport Beach appeared by Dennis O'Neil, City Attorney of Newport Beach, by David R. Baade, Deputy City Attorney. State of Louisiana, Plaintiff in Intervention, appeared by Camp, Carmouche, Palmer, Carwile and Barsh, by E. F. Barnett. Defendants appeared by William D. Keller, United States Attorney, Central District of California, John E. Nordin, Assistant United States Attorney, Carla A. Hills, Assistant Attorney General, Stanley D. Rose, Acting Chief, Economic Stabilization Section, by Bruce G. Forrest and Allen W. Hausman. *Amici Curiae*, Independent Refiners Association of California, Inc., and Edgington Oil Company, appearing by Demetriou and Del Guercio, by Ronald J. Del Guercio, Richard A. Del Guercio, and James R. Jurecka. *Amici Curiae* West Coast Oil and San Joaquin Refining appearing by Ball, Hunt, Hart, Brown and Baerwitz, by Clark Heggeness. Evidence was submitted in the form of a verified complaint and sworn affidavits. Oral and written arguments were presented to the Court, and under date of April 25, 1974, the Court issued its ruling and under date of May 1, 1974, the Court issued its opinion. Thus, being fully advised, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. This action arises under Section 5 of the Emergency Petroleum Allocation Act of 1973, Public Law 93-159; 87 Stat. 627 (hereinafter the "Petroleum Allocation Act"), and Sections 210 and 211 of the Economic Stabilization Act of 1970, as amended, Public Law 92-210, 85 Stat. 743; Public Law 93-28, 87 Stat. 27 (hereinafter the "Economic Stabilization Act").

2. Plaintiff, State of California, is acting herein by and through its State Lands Commission, which is vested by law with exclusive jurisdiction over all tidelands and submerged lands owned by the State, and all jurisdiction and authority remaining in the State as to tidelands and submerged lands as to which grants have been made by the California Legislature in trust to local governmental activities. As to tidelands and submerged lands and all other lands in which the minerals are owned by the State, the State Lands Commission has the exclusive jurisdiction and authority to issue and administer leases or contracts for the exploration, development and production of oil, gas and other hydrocarbons therefrom. State owned lands from which oil and gas are presently being produced and which are the subject matter of this action are primarily tidelands and submerged lands located in the Counties of Orange, Los Angeles, Ventura and Santa Barbara.

3. Plaintiff, City of Long Beach, is a California municipal corporation, located in the County of Los Angeles. By virtue of grants from the California Legislature, the City of Long Beach is the owner, as trustee for the State, of certain tidelands and submerged lands within the boundaries of said City, which lands are subject to drilling and operating contracts between the City and private contractors for the exploration, development, and production of

oil, gas and other hydrocarbons. The City of Long Beach has similar contracts and leases with regard to certain upland properties within the City limits, some owned by the City in its general municipal capacity and others owned by the City as trustee for the State.

4. Plaintiff, City of Newport Beach, is a California municipal corporation, located in the County of Orange. By virtue of grants from the California Legislature, the City of Newport Beach is the owner, as trustee for the State, of certain tidelands and submerged lands within the boundaries of said City, which lands are subject to a contract between the City and a private contractor for the exploration, development and production of oil, gas, and other hydrocarbons.

5. Intervenor, State of Louisiana, is acting herein by and through its Commissioner of Conservation, who is authorized by law to represent the State in all matters involving and affecting the interest of the State and its residents, relative to its natural resources and energy, including particularly oil, gas and other hydrocarbons and which are the subject matter of this intervention.

6. Defendant John C. Sawhill is the present Administrator of the Federal Energy Office and has been delegated with and now exercises all the authority vested in the President by the Petroleum Allocation Act and Section 203(a)(3) [87 Stat. 27] of the Economic Stabilization Act, all pursuant to Executive Order 11748, dated December 4, 1973, (38 FR 33575, Dec. 6, 1973). (Exhibit "D" to the Complaint herein).

7. The office of Deputy Administrator of the Federal Energy Office is presently unfilled, but when and if such office is filled, the holder thereof will be automatically

substituted as a party defendant under Rule 25(d) of the Federal Rules of Civil Procedure.

8. Defendant William N. Walker is, and at all times subsequent to December 4, 1973, has been, the General Counsel of the Federal Energy Office, and at all times subsequent to December 4, 1973, has been duly delegated with authority to issue rules and regulations and notices of proposed rules and regulations issued pursuant to the Petroleum Allocation Act and Section 203(a)(3) of the Economic Stabilization Act, and with authority to enforce such rules and regulations. At all times during a period commencing prior to September 6, 1973, and ending on or about December 4, 1973, defendant William N. Walker was General Counsel for the Cost of Living Council, established by the President of the United States to carry out the authority vested in the President by the Economic Stabilization Act.

9. Defendant William C. Arntz is the Regional Administrator, Region 9, Office of Oil and Gas, which Region includes the State of California, and is empowered to order compliance within said Region with rules and regulations adopted by the Federal Energy Office.

10. During a period commencing prior to August 6, 1973, and ending on December 4, 1973, the power to regulate charges and prices for materials, and property, including crude oil, vested in the President under the Economic Stabilization Act, was delegated to the Cost of Living Council. Under the Phase IV rules and regulations duly adopted by the Cost of Living Council during this period, prices and charges by State and local governments for such materials and property, including crude oil, were exempt. Said exemption was set forth in 6 CFR sections

150.54(a)(2) (38 FR 21601, August 9, 1973) and 150.54 (f)(2) (38 FR 21598, August 16, 1973), contained in the Phase IV Price Regulations. True and correct copies of letters from the Chief Counsel of the Cost of Living Council in the form of Exhibits "A" and "B" and a Notice of Proposed Rulemaking by the Cost of Living Council in the form of Exhibit "C" to the Complaint herein demonstrate the administrative construction of these sections as exempting state and local governments, as hereinabove found. A true and correct copy of a letter from the Chief of the Prices and Rents Rulings Branch of the Internal Revenue Service is attached as Exhibit "G" to the Complaint herein. This letter related to 6 C.F.R. §101.34 (37 FR 5043, Mar. 9, 1972) of the Phase I Price regulations, whose language is virtually identical to section 150.54(a) of the Phase IV Price Regulations and demonstrates that this interpretation goes back to at least June 9, 1972.

11. On October 25, 1973, the Cost of Living Council issued a notice of proposed rule making (38 FR 29618-29619, October 26, 1973) in the form of Exhibit "C" to the Complaint herein. Said notice specified an intent to eliminate the state and local governmental exemption with regard to crude oil and other petroleum products, by adding exceptions to the aforesaid sections 150.54(a)(2) and 150.54(f)(2) of Title 6 of the Code of Federal Regulations, *i.e.*, the Phase IV Price Regulations. Said notice expressly recognized the existence of said state and local governmental exemption and specifically stated that: "All comments received by November 24, 1973, will be considered by the Council before final action is taken on the proposed regulation" and further described November 24, 1973, as "the ending date for comment."

12. Shortly after the issuance of the aforesaid notice of proposed rule making of October 25, 1973, and substantially prior to November 24, 1973, the State of California, acting on behalf of itself and the other plaintiffs herein, requested in writing that the Cost of Living Council conduct formal and oral public hearings for the purpose of hearing arguments and acquiring information bearing on the proposed termination of the state and local exemption with regard to crude oil, and other petroleum products, pursuant to the provisions of §207(c) of the Economic Stabilization Act (85 Stat. 743) and section 553 of the Administrative Procedure Act (5 U.S.C. §553). Section 207(c) of the Economic Stabilization Act provides:

> "To the maximum extent possible, the President or his delegate shall conduct formal hearings for the purpose of hearing arguments or acquiring information bearing on a change or a proposed change in wages, salaries, prices, rents, interest rates, or corporate dividends or similar transfers, which have or may have a significantly large impact upon the national economy, and such hearings shall be open to the public except that a private formal hearing may be conducted to receive information considered confidential under section 205 of this title."

Said section 207(c) is incorporated by reference into the Petroleum Allocation Act by section 5(a)(1) thereof.

13. The Cost of Living Council denied said request for a public hearing with respect to the aforesaid notice of proposed rule making. A true and correct copy of said denial is attached as Exhibit "F" to the Complaint herein.

14. The Petroleum Allocation Act of 1973 was passed by the Congress of the United States, and approved by the President of the United States on November 27, 1973. Section 4(a) of said Act required the President to promulgate a regulation providing for the mandatory allocation of crude oil and certain other petroleum products" . . . in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation." Said regulation was to take effect not later than fifteen days after its promulgation. By section 4(g)(1) of said Act the President, or his delegate, was authorized to amend said regulation. With an exception not here applicable, section 5(a)(1) of said Act provides that certain sections of the Economic Stabilization Act (including section 207 which, in turn, incorporates section 553 of the Administrative Procedure Act, 5 U.S.C. §553) are applicable to the Rule referred to in section 4(a) of said Act and any action taken by the President or his delegate under said Act. 5 U.S.C. §553 is made expressly applicable to the Federal Energy Office by section 205.201 of the Rules and Regulations of said Office (39 FR 1930, Jan. 15, 1974).

15. By Executive Order 11748 dated December 4, 1973 (38 FR 33575, December 6, 1973), the President established in the Executive Office of the President a Federal Energy Office under the immediate supervision and direction of an Administrator and a Deputy Administrator, Federal Energy Office. Said Order delegated to said Administrator (and his delegatees) all the authority vested in the President by the Petroleum Allocation Act and by section 203(a)(3) of the Economic Stabilization Act (87 Stat. 27). The effect of said Executive Order was to transfer from the Cost of Living Council to the Federal Energy Office the pricing authority with respect to crude

oil and other petroleum products vested in the President by the Economic Stabilization Act and the Petroleum Allocation Act. A copy of said Executive Order is attached as Exhibit "D" to the complaint herein.

16. Pursuant to section 4(c) of the Petroleum Allocation Act, proposed mandatory fuel allocation regulations were promulgated by defendant John C. Sawhill, then Deputy Administrator of the Federal Energy Office, on December 11, 1973 (38 FR 34414 *et seq.*, Dec. 13, 1973). Part 201 of said proposed regulations (38 FR 34433-434) adopted by reference the pricing provisions contained in Part 150 of Title 6 of the Code of Federal Regulations (*i.e.*, the Phase IV Price Regulations adopted by the Cost of Living Council), thus continuing in effect the former state and local exemption with regard to crude oil, as stated in Finding No. 10 hereof. Said proposed regulations were to be designated as Chapter II of Title 10 of the Code of Federal Regulations, which Title was to be retitled from "Atomic Energy" to "Energy" (38 FR 34414).

17. Said proposed regulations referred to in paragraph 16 hereof recognized the applicability of section 553 of the Administrative Procedure Act (5 U.S.C. §553) to rule making by the Federal Energy Office pursuant to the Petroleum Allocation Act and the Economic Stabilization Act, insofar as it relates to petroleum pricing. However, pursuant to 5 U.S.C. §553(d)(3), the period of publication was shortened so as to end on December 20, 1973, for good cause found and published with the proposed rule (38 FR 34415, Dec. 13, 1973.)

18. Relying on the apparent intent of the Federal Energy Office to adopt by reference the pre-existing state and local exemption set forth in Part 150 of Title 6 of the Code of Federal Regulations, plaintiffs, plaintiff in

intervention, and each of them, deemed it unnecessary to comment upon Part 201 of said proposed regulations relating to pricing.

19. Mandatory fuel allocation regulations were adopted pursuant to said proposal of December 11, 1973, by the Federal Energy Office on December 27, 1973 (39 FR 744, Jan. 2, 1974). The pricing provisions set forth in Part 201 thereof were adopted precisely as proposed, and the state and local exemption was thus formally adopted and approved by the Federal Energy Office. Said regulations specified January 15, 1974, as the implementation date for all the provisions of the revised program of allocation (39 FR 744).

20. On January 14, 1974, one day before the implementation date of the December 27, 1973, regulations referred to in Finding No. 19, the Federal Energy Office revoked said regulations and issued new regulations designated as Parts 205, 210, 211, and 212 of Title 10, Chapter II, of the Code of Federal Regulations. (39 FR 1924 *et seq.*, January 15, 1974.) Said regulations of January 14, 1974, made substantial changes in the said regulations of December 27, 1973. These changes included the adoption of 10 C.F.R. Part 212, which set forth in full pricing provisions applicable to crude oil and other petroleum products. Section 212.52(b) of said regulations (39 PR 1952) expressly stated that: "Prices charged for any sale, lease or lease-sale of a covered product [including crude oil] by State and local governments are exempt." This section retained, in express language, the state and local governmental exemption theretofore contained in the rules and regulations issued by the Cost of Living Council and the Federal Energy Office and constituted a formal and explicit retention of the previously announced

regulatory scheme, insofar as it related to the exemption of prices charged for crude oil by State and local governmental entities.

21. The general statement incorporated into the said regulations of January 14, 1973 (39 FR 1924) included the following language:

> "Due to the fact that a substantial revision of the regulatory scheme has occurred and the Federal Energy Office realizes that unanticipated problems with the regulations will surely arise, the Federal Energy Office is inviting comment on these regulations. *Although no specific future changes are currently anticipated,* the Federal Energy Office would appreciate all comments or suggestions which might assist in future improvements to the program. Comments should be submitted in at least ten copies, clearly labeled on the envelope 'Comments on Regulations.' The mailing address is Executive Secretariat, Federal Energy Office, Washington, D.C. 20461. Submission of comments before January 31, 1974 is encouraged." (Emphasis added.)

The general statement contained in said regulations of January 14, 1973, did not constitute, nor was it intended to constitute, a notice of further proposed rule making as required by section 553 of the Administrative Procedure Act (5 U.S.C. §553.)

22. The Federal Energy Office, once established, took what it wanted from the Cost of Living Council, republished regulations as its own which kept the exemption,

and also stated that there was no present intention of changing the regulations. Those actions terminated the rule making proceedings begun by the October 25, 1973, notice.

23. On February 21, 1974, defendant William N. Walker, acting on behalf of the Federal Energy Office, and with the purported authority of former defendant William E. Simon and defendant John C. Sawhill, issued an amendment to regulations (39 FR 7176-77, Feb. 25, 1974) revoking the State and Local exemption retroactively to October 25, 1973. A true and correct copy of said amendment is attached as Exhibit "E" to the Complaint herein. Said amendment was purportedly issued pursuant to the notice of proposed rule making issued by the Cost of Living Council on October 25, 1973 (referred to in Finding No. 9 and a copy of which is attached as Exhibit "C" to the Complaint herein). Said amendment took the form of a deletion of section 212.52(b) of Title 10 of the Code of Federal Regulations, quoted in Finding No. 20.

24. If, following termination of the rule making proceedings under the October 25, 1973 notice, the Federal Energy Office desired to change the regulations, it was required by law to proceed in accordance with §553 of the Administrative Procedure Act (5 U.S.C. §553) for this section is made expressly applicable to Federal Energy Office rule making by the Emergency Petroleum Allocation Act of 1973. In pertinent part this section requires that notice of proposed rule making shall be published in the Federal Register; that the required publication be made not less than 30 days before the effective date of a rule; and that after the notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written

or oral data, views and arguments. The revocation of the state and local exemption on February 21, 1974, constituted rule making within the meaning of this section and cannot be upheld because of its obvious failure to comply with the administrative procedure requirements.

25. Plaintiffs, plaintiff in intervention, and each of them, correctly assumed the legal situation prior to February 21, 1974, to be as stated in Findings No. 22 and 24, and relied upon said assumption.

26. Events occurred between November 24, 1973, the ending date for comment on the notice of proposed rule making of October 25, 1973, and February 21, 1974, which events could have had a significant effect upon the nature and thrust of any comments which could have been made as of the earlier date. Among the events were the following:

(a) With regard to the oil produced from plaintiffs' leases and contracts, the discrepancy between the ceiling price and the true market value as reflected by the exempt price therefor rose from $1.65 (based on the last announcement available to plaintiffs before November 24, 1973) to $5.00 (the discrepancy as of February 21, 1974). This 300% increase means that State and local governments are now receiving less than one-half the true market value for their oil.

(b) Based upon revenue estimates predicated upon the repeated actions by the Federal Energy Office seeming to assure the continuance of the State and local exemption, plaintiffs State Lands Commission and City of Long Beach commenced plans to devote millions of dollars to increased secondary recovery operations in the Wilmington

Oil Field, the largest producing field in North America, which operations would substantially increase the production otherwise recoverable from said Field.

(c) Proposals were made by prominent State officials to utilize the increased revenues arising from the exemption for rapid transit and other purposes designed to ameliorate the energy crisis.

(d) Subsequent to November 24, 1973, basic legislation, such as the Emergency Petroleum Allocation Act, was enacted, and pursuant thereto Federal officials adopted a specific scheme for allocation and pricing within the context of a single regulatory framework, whereas as of November 24, 1974, any comments on the effect of the exemption were necessarily based upon speculative assumptions as to future legislation and regulations.

27. The action of the Federal Energy of February 21, 1974, amending its regulations to eliminate the exemption, even if otherwise valid, cannot be given retroactive effect for the following reasons, and each of them:

(a) Such retroactivity is not permitted under the Petroleum Allocation Act and the Economic Stabilization Act, or either of said Acts;

(b) The amendment was not a matter of first impression, but was a change of a rule under which the parties had been acting and on which they had relied since its adoption by the Federal Energy Office;

(c) The amendment represents an abrupt departure from a well established practice and does not merely attempt to fill a void in an unsettled area of law, in that prices and charges by State and local governments had been exempt from Federal price regulations first published by the Cost of Living Council (the predecessor agency to the Federal Energy Office with regard to the pricing of petroleum products) on March 9, 1972, as more fully set forth in Finding No. 10 hereof;

(d) Each of the original plaintiffs in this action has entered into contracts for the sale of crude oil involving, in the aggregate, millions of dollars in reliance upon the state and local governments' exemption, either as originally promulgated by the Cost of Living Council, or as continued in effect by the Federal Energy Office;

(e) Each of the plaintiffs has included in its budget revenue from the sale of crude oil at prices determined in reliance on the exemption, and the Executive Officer of the State Lands commission specifically relied on the rules adopted by the Federal Energy Office on December 27, 1973, and January 14, 1974 in executing royalty oil sales contracts.

(f) There is no strong compelling statutory interest in applying the new rule retroactively. The continuance of the exemption will permit additional expenditures by plaintiffs State of California and City of Long Beach for increased oil production, which is one of the objectives of the Emergency Petroleum Act of 1973. Whatever statutory interests there may be do

not counterbalance the inequity of retroactive application of the said amendment of February 21, 1974.

28. On March 5, 1974, the Federal Energy Office issued a Notice of Public Hearing entitled "Proposed Reconsideration of Price Controls on Petroleum Products Leased or Sold by State or Local Governments," which Notice was published on March 7, 1974 (39 FR 8996). Pursuant to said Notice, a hearing was held by the Federal Energy Office at 10:00 a.m., e.d.s.t., on March 13, 1974. Any person selected to be heard at said hearing was to be so notified before 5:00 p.m., e.d.s.t., March 11, 1974, and was given until 5:00 p.m., e.d.s.t., March 15, 1974, in which to make any written submissions. On April 2, 1974, less than 30 days after the issuance of said Notice, and without any statement of good cause found or published therewith, the Federal Energy Office issued a rule revising the provisions of 10 CFR §212.52 (39 FR 12255, April 4, 1974). In effect, such revision left unchanged the amendment of February 21, 1974, purporting to revoke retroactively to October 25, 1973, the State and local government exemption, but did provide that the amendment of February 21, 1974, should be slightly modified with regard to a limited number of sales contracts, so as to allow State and local governments to collect the bonus bid over and above the ceiling price, as distinguished from the exempt price, which is approximately $5.00 per barrel higher.

29. The proceedings described in Finding No. 28 did not in law or in fact cure the invalidity of the amendment of February 21, 1974, for reasons including the following:

a. Said proceedings were predicated upon the false assumption that the amendment of February 21, 1974, was valid;

b. Said revision of April 2, 1974, purports to retain in effect the removal of the State and local government exemption retroactively to October 25, 1973;

c. Said revision was adopted without a publication period of 30 days or more and without any statement of good cause found and published with the rule, in violation of the Administrative Procedure Act [5 U.S.C. §553(d)], and plaintiffs and plaintiff in intervention were not given the time allowed by law and required in fact to prepare adequate comments prior to the purported adoption of said revision; thus said revision was invalid except insofar as it purported to grant or recognize an exemption.

30. Unless defendants and each of them, are restrained from enforcing as against plaintiffs and plaintiff in intervention the provisions of Part 212, Chapter II, Title 10 of the Code of Federal Regulations, plaintiffs and their officers, agents and employees will be forced to forego the collection of royalties and net profits in an aggregate amount exceeding $100 million and increasing at a rate of approximately $1,000,000 per day because of the risk of commencement by said defendants, or persons under their direction and control, of criminal or civil proceedings pursuant to the provisions of Sections 208 and 210 of the Economic Stabilization Act, Section 5 of the Petroleum Allocation Act, and Section 210.82, Chapter II, Title 10 of the Code of Federal Regulations (39 FR 1932, Jan. 15, 1974). If plaintiffs forego such collection, they and each of them risk permanent loss of a substantial portion of said revenue because a large proportion of the purchasers of crude oil from plaintiffs would not have the financial ability to repay retroactively the amounts lawfully due to plaintiffs

and each of them. Furthermore, if plaintiffs and plaintiff in intervention are precluded from collecting the full amount of the revenues lawfully due them for any prolonged period, plaintiffs will be unable to formulate or implement their respective fiscal plans in the interest of their citizens, thus suffering permanent and irreparable damage.

31. There is presently a controversy between plaintiffs and plaintiffs in intervention, on the one hand, and defendants, on the other, as to whether plaintiffs and plaintiff in intervention are exempt from the pricing provisions applicable to crude oil and other petroleum products, set forth in Part 212, Chapter II, Title 10, of the Code of Federal Regulations.

32. The following Conclusions of Law, insofar as they may be considered Findings of Fact, are so found by this Court to be true in all respects.

From the foregoing facts the Court concludes:

CONCLUSIONS OF LAW

1. Issuance of a permanent injunction is appropriate to restrain defendants, and each of them, from enforcing as against plaintiffs and plaintiff in intervention the pricing provisions applicable to crude oil and other petroleum products, set forth in Part 212, Chapter II, Title 10, of the Code of Federal Regulations.

2. Plaintiffs and plaintiff in intervention are entitled to declaratory relief as against defendants, and each of them, in accordance with the findings and conclusions set forth herein.

3. As of October 25, 1973, and prior thereto, plaintiffs, plaintiff in intervention, and each of them, were exempt from the Phase IV Price Regulations adopted by the Cost of Living Council pursuant to the Economic Stabilization Act of 1973, by virtue of the exemption set forth in 6 CFR Sections 150.54(a)(2) (38 FR 21601, August 9, 1973) and 150.54(f)(2) (38 FR 21598, August 16, 1973).

4. The proceedings proposing to terminate said exemption begun by the notice of proposed rule making issued by the Cost of Living Council on October 25, 1973 (38 FR 29618-29619, October 26, 1973) were terminated by the issuance of the Federal Energy Office of the mandatory fuel allocation regulations of December 27, 1973 (39 FR 744, Jan. 2, 1974) and the revisions thereof issued on January 14, 1974 (39 FR 1924, Jan. 15, 1974).

5. The amendment adopted by the Federal Energy Office on February 21, 1974 (39 FR 7176, Feb. 25, 1974) purporting to terminate the State and local government exemption was a nullity in that it was issued without notice and in violation of §553 of the Administrative Procedure Act (5 U.S.C. §553, incorporated by reference into the Emergency Petroleum Allocation Act of 1973 and the Economic Stabilization Act of 1970, as amended).

6. Neither the subsequent proceedings commenced by the Federal Energy Office by its Notice of Public Hearing of March 5, 1974, nor any other action by the Federal Energy Office, pursuant to said Notice, nor any other event, rendered harmless the legal errors committed by the Federal Energy Office in purporting to terminate the State and local government exemption, and plaintiffs, plaintiff in intervention, and each of them, suffered substantial prejudice by reason of said errors.

7. Even if otherwise legally adopted, the amendment of February 21, 1974, could not lawfully operate retroactively for the following reasons, and each of them:

a. The FEO is not authorized by statute to issue retroactive rules;

b. The case was not one of first impression;

c. The amendment represented an abrupt departure from well established practice, and did not merely attempt to fill in a void in an unsettled area of law;

d. Plaintiffs, plaintiff in intervention, and each of them relied extensively on the former rule;

e. The retroactive application of the said amendment would impose a severe burden upon plaintiffs, plaintiff in intervention, and each of them;

f. Whatever statutory interests there may be do not counterbalance the inequity of retroactive application of the said amendment.

8. Plaintiffs, plaintiff in intervention, and each of them, are lawfully entitled to a preliminary and permanent injunction and declaratory relief in accordance with the foregoing findings of fact and conclusions of law.

DATED: _____

_____

JUDGE OF THE UNITED STATES DISTRICT COURT

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

* * * * *

This action came on for hearing before the Court, Honorable Jesse W. Curtis, District Judge presiding and the issues having been duly heard, and a decision having been duly rendered and written, Findings of Fact and Conclusions of Law having been made and entered,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, and DECREED as follows:

1. In accordance with said Findings of Fact and Conclusions of Law.

2. The action of the Federal Energy Office of February 21, 1974 (39 F.R. 7176, *et seq.*), purporting to amend its regulations to delete Sections 212.52(b), Chapter II, Title 10 of the Code of Federal Regulations is invalid and inoperative.

3. The action of the Federal Energy Office of April 2, 1974 (39 F.R. 12252, *et seq.*), purporting to substitute a revised Section 212.52(a) in said portion of the Code of Federal Regulations is invalid and inoperative to the extent it purports to withdraw the exemption from price controls for the sale of covered products by state and local governments. This Judgement does not affect the action of the Federal Energy Office with regard to bonus payments or the withdrawal of the exemption with regard to federal sales of covered petroleum products.

4. A preliminary and permanent injunction shall issue against defendants, and each of them, and against any person

or persons succeeding to the official positions designated in such manner as defendants in the complaint herein, as follows:

a. Defendants, and each of them, are hereby enjoined from attempting to enforce as against plaintiffs, plaintiff in intervention, or any of them, the provisions of Part 212, Chapter II, Title 10, of the Code of Federal Regulations insofar as said attempt is based upon said actions of February 21, 1974 and April 2, 1974, or either of them.

b. Defendants, and each of them, are enjoined from taking any action against any lessee of, or any person having contractual relations with, plaintiffs, plaintiff in intervention, or any of them, based upon the purported elimination of the exemption as reflected in the actions of the Federal Energy Office of February 21, 1974 and April 2, 1974, or either of them.

5. Defendants' Motion to Dismiss is hereby denied.

6. This Judgment is hereby stayed for a period of five days from and after the date of entry hereof; provided that during the period of said stay, the terms of the preliminary injunction filed herein on April 16, 1974 shall remain in full force and effect.

DATED: This 23rd day of May, 1974 at 12:01 P.M.

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/s/ _____
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

EVELLE J. YOUNGER
Attorney General of California

/s/ _____
JAY L. SHAVELSON
Assistant Attorney General

Attorneys for Plaintiffs

WILLIAM D. KELLER
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FREDERICK M. BROSIO, JR.
Assistant U.S. Attorney
Chief, Civil Division

/s/ _____
JOHN E. NORDIN
Assistant U.S. Attorney

Attorneys for Defendants

APPENDIX C

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

BEFORE JUDGES CARTER, CHRISTENSEN
AND ESTES

No. 9-12

People of the State of California, et al.,
Plaintiffs-Appellees,

and State of Louisiana,
Intervenor-Appellee,

v.

William E. Simon, et al.,
Defendants-Appellants.

This cause came on to be heard on the record on appeal from the U.S. District Court for the Central District of California and was argued by counsel whereupon,

IT IS ORDERED that the judgment of the District Court is REVERSED. The judgment and the mandate shall be entered and filed forthwith, with the opinion to follow.

FOR THE COURT:

Thomas R. Napton
Clerk

/s/ by Donna M. Bold
Donna M. Bold
Deputy Clerk

July 26, 1974

APPENDIX D

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 9-12

* * * * *

The decisive issue on this appeal is whether the Federal Energy Office (FEO) had already terminated a rule making proceeding initiated by its predecessor The Cost of Living Council (CLC) when it rescinded the state and local government exemption of crude oil from price controls in reliance upon, and effective as of the date of, the CLC's original rule making notice contemplating such action. We are told that for the appellees alone some quarter of a billion dollars in contested charges, together with daily accessions of more than a million, directly depends upon the answer.[1] We have been mindful also of even farther reaching agency actions and policies which, consistent with basic fairness, are to be respected within

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[1] Because of their reliance upon government sources of supply, a corollary impact will be concentrated upon certain independent refiners concerning whose situation FEO commented during the rule making proceeding: "... When this supply data is combined with the dramatically increased prices for exempt crude oil, the magnitude of the impact that primarily is confined to a small group of independent refiners becomes apparent ... [T]he amounts involved are not insignificant and the impact upon purchasing refiners and ultimate consumers is magnified by the price spread of about $5.00 per barrel between ceiling prices for old oil and uncontrolled prices for exempt oil." (39 F.R. 12253-54.)

applicable requirements and guidelines of the Economic Stabilization, the Administrative Procedure and the Emergency Petroleum Allocation Acts. Having concluded that in this vital process of modern government[2] the rule in question was not aborted by any significant malformation, we reverse the judgment of the district court which treated the FEO's withdrawal of the state and local government exemption as invalid.[3]

With powers vested in the President by the Economic Stabilization Act and by him delegated to CLC, the latter on August 22, 1973, as part of its Phase IV price control program, issued Cost of Living Council Regulations which provided comprehensive price controls for for various types of property. By the terms of "Subpart L", all crude petroleum produced in the United States was subject to price regulation, except for new and released petroleum and petroleum produced from stripper wells, which were left free of price control to encourage additional domestic production. But an exemption was established for certain prices and fees charged by state and local governments and government property.[4] By

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[2] "The procedure of administrative rule making is one of the greatest inventions of modern government." Davis, *Administrative Law Treatise* §6.15, p. 283 (1970 Suppl.).

[3] The jurisdiction of this court is based upon Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, which incorporates by reference Sections 205-211 of the Economic Stabilization Act of 1970, as amended, including judicial review provisions granting original jurisdiction to the district courts and appellate jurisdiction to this court with reference to actions, orders and regulations under the Act.

[4] 6 C.F.R. §§150.54(a)(2) and 150.54(f)(2).

interpretation of the agency this exemption covered sale of crude oil by those governments in their proprietary capacities.[5]

On October 25, 1973, CLC issued a notice of proposed rule making[6] which among other things stated:

> "Notice is hereby given that, pursuant to the authority of Executive Orders 11695 and 11730, Cost of Living Council, as part of its continuing review of the operation of price controls with respect to the petroleum industry is considering the adoption of certain amendments to exclude sales of 'covered products' as defined in Subpart L from the exemption of price adjustments by State and Local governments."

The notice invited interested persons to participate in the rule making by submitting written data, views or arguments with respect to the proposed regulation and specified that

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[5] Union has contended that the initial state and local exemption, under principles of *ejusdem generis*, did not apply to sales by the state in its proprietary capacity of crude oil subject to Subpart L and that a contrary construction would present a serious question as to whether the classification conforms with the statute or the Constitution. However, those questions are not presented by this appeal, and for its purposes may be assumed to be laid to rest by the interpretation implicit in the October 25, 1973, notice of the CLC next mentioned. Amici curiae Edgington Oil Company and Independent Refiners Association of California, Inc., contend that even if the termination of the state and local government exemption were invalid, the grant of the exemption itself was also invalid for failure to follow the rule making procedures of the Emergency Petroleum Allocation Act and the Administrative Procedure Act. We do not consider this contention in view of our ruling that the termination of the exemption by FEO was valid.

[6] 38 F.R. 29618, Oct. 26, 1973.

all comments received by November 24, 1973, "will be considered by the Council before final action is taken on the proposed regulation". California and Louisiana, among others, timely submitted comments. It is not contended by any party that the notice and proceedings up to this point were deficient either in form or substance or that they would not have permitted the promulgation of a regulation by FEO as successor to CLC validly removing the state and local government exemption had the former not reiterated the exemption in establishing the regulatory framework of its activities under the circumstances hereinafter noted.

The Emergency Petroleum Allocation Act of 1973 was approved on November 27, 1973. Section 4(a) required the President to provide within fifteen days after enactment for the mandatory allocation of crude oil and various petroleum products in amounts and at prices "specified (or determined in a manner prescribed by)" his regulations.

The FEO was created by Executive Order 11748[7] on December 4, 1973. Its Administrator was thereby vested with all powers delegated to the President by the Emergency Petroleum Allocation Act, and the Chairman of CLC was authorized to delegate to the Administrator "such authority under the Economic Stabilization Act as may be necessary to carry out the purposes of that Act with respect to energy matters."

Acting pursuant to Section 4(a) the FEO issued proposed mandatory fuel allocation regulations[8] on December 11, 1973. Part 201 of these regulations adopted by reference the pricing provisions of CLC's Phase IV Regulation

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[7] 88 F.R. 33575, Dec. 6, 1973.

[8] 38 F.R. 34414 et seq., Dec. 13, 1973.

mentioned above,[9] thus containing in effect the state and local government exemptions in accordance with the CLC's interpretation.

On December 26, 1973, the Chairman of CLC issued an order delegating to the Administrator of FEO the powers vested in him pursuant to Executive Orders 11695 and 11730 "to make determinations and take actions required or permitted by the Economic Stabilization Act of 1970, as amended, with respect to petroleum products and crude oil. . . . " and further providing as follows:[10]

> "6. All orders, regulations, circulars or other directives issued and all other actions taken pursuant to any authority delegated to the Administrator by this order prior to and in effect on the date of this order are hereby confirmed and ratified, and shall remain in full force and effect, as if issued under this order, unless or until altered, amended or revoked by the Administrator or by such competent authority as he may specify."

One of the "actions taken" pursuant to the delegated authority was the pending rule making proceeding which had been instituted on October 25, 1973.

On December 27, 1973, Mandatory Fuel Allocation Regulations were adopted by the FEO as proposed on December 11, 1973.[11] The pricing provisions set out in Part 201 were thus adopted, continuing in effect the state and local government exemption. These regulations specified January 15, 1974, as the implementation date for all of the provisions.

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[9] 6 C.F.R. 150.

[10] Delegation Order 47, 39 F.R. 24, January 2, 1974.

[11] 39 F.R. 744, et seq., Jan. 2, 1974.

On January 14, 1974, one day before the implementation date last mentioned, FEO revoked the December 27 regulations and promulgated revised regulations designated as Parts 205, 210, 211 and 212 of Title 10, Chapter II of the Code of Federal Regulations. Part 212 set out in full pricing provisions for crude oil and other petroleum products. Section 212.52(b) expressly stated: "Prices charged for any sale or lease-sale of a covered product [which included crude oil] by state and local governments are exempt." In explanation, the Deputy Administrator stated:[12]

> "A new Part 210 has been created establishing the general rules which apply to both the price control and allocation programs. This part extracts sections previously located in Subpart A of Part 200 and in the Phase IV Price Regulations in 6 CFR Part 150.
>
> "The creation of Part 210 recognizes the compelling necessity of viewing both allocation and price problems within the context of a single regulatory framework.
>
> . . . .
>
> "Due to the fact that a substantial revision of the regulatory scheme has occurred and the Federal Energy Office realizes that unanticipated problems with the regulations will surely arise, the Federal Energy Office is inviting comment on these regulations. Although no specific future changes are currently anticipated, the Federal Energy Office would appreciate all comments or suggestions which might assist in future improvements to the program. . . ."

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[12] 39 F.R. 1924, Jan. 15, 1974.

Neither the FEO's December 11 proposal, its regulations of December 27, nor the January 14 codification contained any reference to the rule making proceeding instituted October 25, 1973, by CLC and delegated in general language as noted above by the latter to FEO on December 26. The appellees, in line with the opinion of the court below, contend that this circumstance, coupled with the FEO comment of January 14 hereinabove quoted, indicated an abandonment or termination of the rule making proceeding in question. The appellants draw the opposite conclusion, contending that the absence of any express disposition, the inherently ongoing nature of that process and the interim necessity of establishing on its own responsibility the mandatory regulatory framework with reference to which the proposed rule making could continue and, indeed, was continued under consideration, negated any implied or constructive termination.

In any event, on February 21, 1974, FEO issued an order, by which it expressly acted upon the CLC's Notice of Proposed Rule Making dated October 25, 1973, to revoke the exemption for state and local governments effective as of the latter date finding, among other things, that the exemption, if not so removed, "would tend to have a disruptive impact on the national distribution system."[13]

On March 7, 1974, as a result of representations of the appellees, FEO issued a notice of proposed reconsideration of the February 21 decision. A hearing was scheduled for March 13, 1974, and the public was invited

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[13] 39 F.R. 7176, February 25, 1974, deleting §212.52(b) of 10 C.F.R., *supra*.

to submit written comments by March 15 in lieu of, or in addition to, oral presentations.[14]

April 2, 1974, upon reconsideration in the light of supplemental information provided by the parties, FEO reconfirmed its decision to withdraw as of October 25, 1973, the examption of state and local government sales of covered petroleum and petroleum products with two modifications: The federal government exemption also was removed; and " . . . with respect to deliveries of crude oil made on or before February 21, 1974, a state or local government may charge a bonus price per barrel of crude oil provided that such bonus price was stipulated in existing contracts. . . . "[15]

This action was commenced by plaintiffs-appellees in the district court on March 13, 1974, seeking declaratory and injunctive relief. On April 25, 1974, plaintiffs' application for a preliminary and permanent injunction was granted with a "memorandum opinion to follow." The opinion was filed May 1, and in harmony therewith formal findings of fact, conclusions of law and judgment and order[16] were entered May 28, from which this appeal was timely perfected. This court on May 29, 1974, granted

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[15] 39 F.R. 12255, April 4, 1974.

[16] The district court found that the FEO had terminated its rule making proceedings before the action of February 21, 1974, thereby rendering that decision invalid. It was held also that, even if otherwise valid, the withdrawal of the exemption could not be applied retroactively to transactions which occurred before February 21, 1973. While the court below held no formal trial, its findings were based in part upon uncontroverted affidavits filed by the plaintiffs and intervenors in support of the motion for preliminary injunction. The judgment among other things permanently enjoined the defendants from attempting to enforce as against the plaintiffs or

(Continued)

defendants-appellants' Motion for Stay Pending Appeal to "maintain the status quo" and "in no way reflect[ing] a decision on the merits." An expedited briefing schedule was ordered. Upon hearing oral argument following careful consideration of the briefs, and deeming ourselves fully advised, we reversed without delay in view of the rapidly increasing magnitude of the excess charges in question.[17] This opinion now more fully documents such determination.

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[16] (Continued) plaintiffs in intervention the provisions of Part 212, Chapter II, Title 10 of the Code of Federal Regulations insofar as said attempt was based upon the actions on February 21, 1974, and April 2, 1974, and from taking any action against any lessee of, or any person having contractual relations with, plaintiff or plaintiff in intervention based upon the purported elimination of the exemption as reflected in the actions of the Federal Energy Office of February 21, 1974, and April 2, 1974.

[17] The judgment of the district court is reversed. Our judgment shall be entered forthwith. The mandate also shall be issued and filed forthwith. An opinion will follow.

This order is made in the interests of expediting a decision and for good cause based on the following facts:

> This is an important case. The parties have sought expedited oral argument. We have set the case for the earliest possible date.
>
> The amount in controversy which is the difference between the controlled and uncontrolled prices for state and local government sales of crude oil is increasing at the rate of $1.2 million per day. The legal uncertainty surrounding these payments is injurious to the interests of all parties as well as third party small independent refiners who have accrued potential liabilities to the states. (Order of July 26, 1974, from the bench.)

While various issues are argued separately in the briefs[18] we regard as largely determinative the one framed at the outset, which may be restated as whether the rule making proceeding initiated by the CLC was terminated prior to February 21, 1974, in the sense of depriving FEO of power in reliance thereon to withdraw the state and local government exemption without giving the statutory notice anew in strict recompliance with the requirements of the Federal Administrative Procedure Act concerning rule making.[19]

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[18] 1. Whether FEO terminated the rule making proceeding proposing to withdraw an exemption for price controls on state and local government sales of petroleum products.

2. Whether such termination, if found, renders invalid its decision of February 21, 1974, to remove the exemption.

3. Whether FEO's reopening the matter for further hearings and written comments cured the alleged legal defect.

4. Whether in removing the exemption from price controls for sales by state and local governments on February 21, 1974, effective as of October 25, 1973; FEO acted unlawfully by imposing a "retroactive" requirement.

[19] Section 5 of the Emergency Petroleum Allocation Act of 1973 provides in part as follows:

> "§5. Administration and Enforcement.–(a)(1) Except as provided in paragraph (2), (A), sections 205 through 211 of the Economic Stabilization Act of 1970 (as in effect on the date of enactment of this Act) shall apply to the regulation promulgated under section 4(a), to any order under this Act, and to any action taken by the President (or his delegate) under this Act, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970. . . ."

By the time of the Economic Stabilization Act as amended, Section 553 of the Administrative Procedure Act applies. That section

(Continued)

We find it unnecessary to rule separately upon appellants' further contention that even though the rule making procedure initiated by the CLC were terminated there yet was substantial compliance with the Administrative Procedure Act which should be deemed to sustain the FEO order of February 21, 1974, in that since by the initial CLC notice the parties were afforded full opportunity for comment in compliance with the Administrative Procedure Act they were not prejudiced by being restricted to an additional eight days in connection with its reconsideration by FEO order, and considering that order as representing a new proceeding. While we question that procedure for reconsideration may be substituted for the required initial notice – the Administrative Procedure Act requires both – the

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[19] (Continued) provides in substance that general notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice in accordance with law, the notice to state the time, place and nature of the public rule making proceedings, a reference to the legal authority under which the rule is proposed and either the terms or substance of the proposed rule or a description of the subjects and issues involved. The agency is required to give interested persons an opportunity to participate in the rule making through submission of written data, views or argument with or without opportunity for oral presentation. "After consideration of the relevant matter presented, the agency shall incorporate in the rule adopted a concise general statement of their basis and purpose." It is further provided that the required publication or service of a substantive rule shall be made not less than 30 days before its effective date except as to substantive rules which grant or recognize an exemption or relieve a restriction, interpretive rules and statements of policy or as otherwise provided by the agency for good cause found and published with the rule. It is further provided that each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

former, together with other phases of the entire rule making proceeding may be looked to on the termination issue particularly in relation to the problem of essential fairness. In the absence of any termination of the proceeding, the problem of retroactivity becomes less acute.

No dispute is presented concerning the substantive merits of the action withdrawing the state and local government exemption. The attack against it is directed purely to the procedure utilized. There is little of substance to the claim that intervening transfer of authority from CLC to FEO and the subsequent republication of price control regulations by FEO in a different section of the Code of Federal Regulations terminated the rule making proceeding. In the republication of January 14, 1974, upon which appellees principally rely, there was no discussion of FEO's consideration of the exemption in question, nor was there incorporated a general statement of the purpose for the exemption on the theory that the republication was intended as a determination of the rule making proceeding.[20] That the FEO before issuing its February 21, 1974, order did not intend to substantively resolve the rule making proceeding initiated by its predecessor is not subject to doubt. It never so stated. It indicated expressly to the contrary by its order, the explanatory comments accompanying it,[21] and its notice with respect to, and order denying reconsideration.

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[20] Section 664(d) of the APA provides in part as follows: "After consideration of the relevant matters presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."

[21] FEO therein outlined the history of the exemption, stated that it did not act substantively upon the pricing regulations

(Continued)

We think the appellants are right in saying that but for unique circumstances which caused FEO to promulgate a massively complex petroleum allocation scheme and hold the issue of state and local government price exemption in abeyance until the issues could be approached in a conscientious manner, this controversy never would have arisen. We are of the opinion, as heretofore indicated, that FEO did not terminate this otherwise valid proceeding "essential to prevent serious inflationary injury to the economy and structural injury to the petroleum industry", as FEO found. It was entitled to reasonable leeway in the gale of the congressional deadline while it assumed charge of the regulatory structure before being required to complete the repair initiated by CLC.[22]

No case has been called to our attention, nor can we find any, which applies a doctrine of constructive termination of a rule making proceeding after its express termination by final decision of the responsible agency with the result of reversing the effect of that express determination contrary to the findings and intent of the agency.[23] This is not to say that under some circumstances bad faith, basic unfairness or unconscionable delay could not justify a different result. Such were not present here.

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[21] (Continued) during the course of the transfer of powers, and that the issue surrounding the rule making proceeding was "necessarily deferred until the basic regulatory framework called for by the Act had been formulated and put in effect."

[22] See Mandel v. Simon, 493 F.2d 1239 (T.E.C.A. 1974).

[23] Supplementing the briefs, appellants cited during oral argument Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970), on the question whether under some circumstances administrative inaction may be "the equivalent of an order

(Continued)

Appellees do contend that they justifiably relied upon FEO's reiterations of the exemption as an assurance that the rule making proceeding had been terminated favorably to them, that subsequent removal of the exemption deprived them of fair opportunity to make current comment and that they were led into an injurious change of position. The district court glanced in the same direction.[24] However, there was no finding, nor do the facts indicate, that there was a change of position by any party in interest that would not have been taken in a general hope of the continuation of the exemption had the takeover by FEO not been accomplished prior to the completion of the rule making proceeding. Had there been any induced assumption that the exemption would not be removed as a result of the pending rule making proceeding,

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[23] (Continued) denying relief". That case involved the reviewability of administrative inaction which had the effect of denying interim relief to petitioners. The issues and facts there were quite dissimilar; but its mandate of remand to the agency for decision confirms the incongruity of applying the ruling to this case where a decision concededly supported by the factual record long since has been made by the agency.

[24] It referred to the following events which "could have had" a significant effect upon the nature and thrust of comments made as of the earlier date: A three hundred percent increase in the price of uncontrolled oil, which "means that State and local governments are now receiving less than one-half of the true market value for their oil"; based upon revenue estimates and the actions of the Federal Energy Office seeming to assure the continuance of the exemption, State and local governments involved commenced plans to devote millions of dollars to increased secondary recovery operations; proposals were made by prominent State officials to utilize increased revenues for rapid transit and other purposes; basic legislation, such as the Emergency Petroleum Allocation Act, was enacted.

there still could have been no assurance that by new rule making procedures otherwise initiated, whether retroactive or not, most if not all of the injury the appellees had apprehended would not have occurred anyway. On no theory did appellees have a vested right to a continuation of the preferential treatment. The contention that if a new proceeding had been initiated appellees some way would have been more effective in their arguments against change is unconvincing. The intervening circumstances themselves, including passage of the Emergency Petroleum Allocation Act, would have weakened rather than strengthened their hand. And, in fact, they did have fair opportunity for updated arguments in connection with the proceeding for reconsideration. There is simply no indication that any significant arguments were withheld or disregarded or that the appellees were unfairly treated.[25]

The appellees extract from the January 14, 1974, order the phrase "... although no specific future changes are currently anticipated ..." and argue that this warranted the assumption on their part that the change contemplated by the pending rule making proceeding had been abandoned. This disregards the preceding sentence stating that "a substantial revision of the regulatory scheme has occurred and the Federal Energy Office realizes that unanticipated problems with the regulations will surely arise." There had been a substantial revision as to allocation provisions but not as to prices. The pending rule making did not present an unanticipated problem but one inherent in the exemption and specifically pointed up from the time of the October 25, 1973, notice. In contrast, the new allocation provisions could reasonably have

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[25] See Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220, (D.C. Cir. 1967).

been referred to as involving no current anticipation of future changes; but in general comments for "future improvements" were invited. Irrespective of any question this statement may have raised, appellees' claim of good faith reliance takes on a somewhat hollow, if not artful, sound in view of information elicited during oral argument that at no time prior to actual withdrawal of the exemption did any of them so much as inquire of the agency whether the rule making proceeding looking toward the withdrawal of the exemption had, indeed, been abandoned. And such inquiry manifestly would have precluded the present argument. Moreover, while counsel for the State of California said he advised his client that he was "certain" the proposed withdrawal had been abandoned, it continued to use its form of contract providing a hedge against that prospect.

The district court held that "[t]he action of the Federal Energy of February 21, 1974, amending its regulations to eliminate the exemption, even if otherwise valid, cannot be given retroactive effect . . . " on the findings that each of the original plaintiffs had entered into contracts for the sale of crude oil involving, in the aggregate, millions of dollars in reliance thereon "either as originally promulgated by the Cost of Living Council, or as continued in effect by the Federal Energy Office"; and each of the plaintiffs had "included in its budget revenue from the sale of crude oil at prices determined in reliance on the exemption, and the Executive Officer of the State Lands Commission specifically relied on the rules adopted by the Federal Energy Office on December 27, 1973, and January 14, 1974, in executing royalty oil sales contracts."

As already observed, the rule making procedure was an ongoing one until it culminated in the order of February 21, 1974. The court's additional findings with specific

reference to retroactivity add little to the considerations already discussed. Similar reliance could be claimed with about equal force to any initiation or continuation of an exemption. Yet typical retroactivity questioned but accepted in the cases has included the absence of advance notice such as involved here. Assuming that there was a retroactive application, the rule does not necessarily fail the test relied upon by appellees upon the basis of the district court's findings.[26] A retroactive rule is invalid, generally speaking, only if unreasonable. As said in SEC v. Chenery, 332 U.S. 194, 203 (1947), "[R]etroactivity must be balanced against the mischief of producing a result which is contrary to the statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law." On balance, and in the absence of any finding of fact precluding this view, we are of the opinion that the fixing of the effective date of the withdrawal of the exemption as of October 25, 1973, was not unreasonable.

But we are not concerned with retroactivity in the usual sense. Involved were prices which from the very inception of the rule making proceeding could be regarded as conditional.[27] The October 25, 1973, notice clearly stated that the change if made would be effective as of said date. An order based upon a statutory notice of

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[26] See Retail, Wholesale and Department Store Union, 466 F.2d 380 (D.C. Cir. 1974).

[27] See Woods v. Stone, 333 U.S. 472, 477; University of Southern California v. Cost of Living Council, 472 F.2d 1065 (T.E.C.A. 1972), *cert. denied*, 410 U.S. 928; Fancher v. Clark, 127 F. Supp. 452 (D.C. Colo. 1954).

contemplated rule making specifying an effective date in accordance with the intention revealed in the notice itself and no earlier than the date of the notice involves few, if any, of the problems of retroactive regulation generally. It would seem to be comparable in principle to a judgment which within the court's jurisdiction treats a situation or awards a remedy as of the time of the commencement of the action. In any event, the effective date of the rule in question is not only fair and reasonable but well designed to advance legitimate statutory and administrative policies.

A related question not addressed by the trial court merits additional concern: Whether there was technical compliance with Section 553(d) of the Administrative Procedure Act, which requires publication or service of a substantive rule "not less than 30 days before its effective date, except . . . (3) as otherwise provided by the agency for good cause found and published with the rule. . . . " It was, indeed, so "provided by the agency", but the rule itself contained no express finding of such good cause. Yet from the reasons and purposes there assigned for the withdrawal of the exemption itself, and the very nature of the entire proceeding in context with the Economic Stabilization Act and the Emergency Petroleum Allocation Act, the cogent reasons for the withdrawal of the exemption as of the date of the initial notice were quite obvious. Under such circumstances any flaw was at most purely technical, being neither prejudicial nor invalidating.[28]

We agree that substantial compliance with rule making requirements is essential to the validity of administrative rules therein contemplated. The cases relied upon by

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[28] *Cf.* Hoving Corporation v. FTC, 290 F.2d 803 (2d Cir. 1961).

appellees[29] to demonstrate the necessity of literal compliance are distinguishable on their facts, involving, for example, no notice at all, basically unfair procedures, lack of opportunity to be heard, absence of publication, and similar serious defects. The Supreme Court has furnished no such indication, but to the extent decisions of other courts may suggest a doctrine of technical absolutism in opposition to the effectiveness of the rule under the circumstances here, we decline to follow them. We conclude that the procedure in question from the standpoint of substantial statutory compliance, fairness, circumspection, prior notice, opportunity to be heard and abundant record justification,[30] against the background of an embryonic agency faced with complicated takeover tasks under a Congressional deadline,[31] was such as to properly render such mere technical objection unavailing.

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[29] National Labor Relations Board v. Wyman-Gordon Co., 394 U.S. 759 (1969); Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2d Cir. 1972); Texaco Inc. v. Federal Power Commission, 412 F.2d 740 (D.C. Cir. 1969); Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964); Ann Arbor Railroad Co. v. United States, 358 F. Supp. 933 (E.D. Pa. 1973); Kelly v. United States Department of Interior, 339 F. Supp. 1095 (E.D. Cal. 1972); Gerends v. Butz, 357 F. Supp. 143 (1973).

[30] The FEO in its February 21, 1974, order found *inter alia* that "the price exemption has no significant impact on the supply of crude oil", that it "would tend to have a disruptive impact on the national distribution system", that it was necessary to eliminate the "incentive for state and local governments to seek to enter into agreements or arrangements regarding the sale of covered products which could tend to result in further dislocations in the national distribution system . . . [and] undermine existing supplier relationships and magnify the inflationary effects of the exemption".

[31] *Cf.* Mandel v. Simon, 493 F.2d 1239, 1240 (T.E.C.A. 1973), *supra*; University of Southern California v. Cost of Living Council, 472 F.2d 1065, 1069 (T.E.C.A. 1972).

Finally, the "clearly erroneous rule"[32] relied upon by appellees pervasively to support the district court's conclusions does not aid their position. While we shall assume that the affidavits in the record support the found facts as to any significant issue, these were tenuous at best. Where they are in conflict with the views herein expressed they are either not findings of fact at all, or mixed findings of fact and conclusions of law made under an erroneous view of controlling law, as to which the effect of the clearly erroneous rule is dissipated.[33] Closer to the mark is the great deference with which the acts and interpretations of administrative agencies are to be regarded by the courts when, as here, they are acting within their jurisdiction and in the exercise of delegated duties under the Emergency Petroleum Allocation Act and its predecessor, the Economic Stabilization Act.[34]

The judgment of the district court is reversed and the case remanded with directions to grant the defendants' motion to dismiss the action on the merits.

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[32] Rule 53, Fed. R. Civ. P.

[33] 5A Moore, §52.03[2] pp. 2663-64. See e.g. U.S. v. Mississippi Valley Co., 364 U.S. 520, 526 (1961); United States v. United States Gypsum, 333 U.S. 364 (1948); U.S. v. Richberg, 398 F.2d 523, 526 (5th Cir. 1968); University Hills Inc. v. Patton, 427 F.2d 1094, 1099 (6th Cir. 1970); Rowe v. General Motors Corporation, 457 F.2d 348, 351 (5th Cir. 1972).

[34] Baldwin County Elec. Mem. Corp. v. Price Commission, 481 F.2d 920 (T.E.C.A. 1973); University of Southern California v. Cost of Living Council, 472 F.2d 1065 (T.E.C.A. 1972), *supra*; United States v. Lieb, 462 F.2d 1161 (T.E.C.A. 1972).

APPENDIX E

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

* * * * *

IT IS ORDERED that the judgment date appearing on the lower right hand corner (cover sheet) of the slip opinion issued August 12, 1974 is modified to read "July 26, 1974".

FOR THE COURT:

Thomas R. Napton
Clerk

/s/ by Donna M. Bold
Donna M. Bold
Deputy Clerk

August 14, 1974

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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-171
No. 74-181

STATE OF LOUISIANA,

Petitioner,

vs.

WILLIAM E. SIMON, *et al.*,

Respondents.

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the State Lands Commission, *et al.*,

Plaintiffs-Petitioners,

vs.

JOHN C. SAWHILL, *et al.*,

Defendants-Respondents.

Brief of Amici Curiae in Opposition to Petition for Writ of Certiorari.

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Interest of Amici Curiae.

Independent Oil Refiners Association of California, Inc., is a trade association representing 15 small independent refiners located in the State of California. Edgington Oil Company is a small independent refiner and a member of the association. These Amici have actively participated in the proceedings before the agency, the District Court, and the Court of Appeals.

The interest of the small independent refiner can be found in the findings made by the Federal Energy Office ("FEO") at the time it decided to adopt the rule in question. The FEO found, "It appears that much of the crude oil sold by State and local governments is purchased by small independent refiners which, if they are required to pay the substantially higher prices now obtainable for uncontrolled crude oil, may experience severe competitive harm. Thus, although the relative quantity of crude oil involved is small, the effects of the exemption are focused on a particular segment of the industry, and the preservation of the competitive viability of small and independent refiners, which is a specific objective of the [Emergency Petroleum Allocation] Act, would not be adequately accomplished unless the exemption is removed." (39 F.R. 7177).

To illustrate the impact upon the independent refiner, a particular grade and gravity of crude oil which sold for $2.85 per barrel on May 15, 1973 (prior to Phase IV regulations) would now sell for $4.20 per barrel[1] if subject to price controls but would sell for about $9.20 per barrel[2] if exempt from price controls. The traditional role of the independent refiner and marketeer has been to sell at prices competitive to those of the major oil companies. The independent refiner could not continue to compete with the vertically integrated major oil companies if government-owned oil were exempt and therefore more than twice the price of oil obtained from private sources.

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[1]FEO Regulation Section 212.73 allows a producer to charge $1.35 per barrel over the highest posted price on May 15, 1973, for that particular grade at that field.

[2]There is a price spread of about $5.00 per barrel between controlled prices and uncontrolled prices (39 F.R. 12254).

In the administrative proceedings for the adoption of the rule, the FEO specifically found: (1) The exemption would be harmful to the competitive position of independent refiners (39 F.R. 12253-54); (2) continuance of the exemption would result in windfall revenues for State and local governments (39 F.R. 7176, 39 F.R. 12254); and (3) removal of the exemption would not create windfall profits for refiners (39 F.R. 12254).[3]

Statement of the Case.

No dispute is presented regarding the substantive merits of the FEO rule withdrawing the State and local government exemption. The attack against it is directed purely to the procedure involved. Petitioners contend (and we dispute) that the rule of February 21, 1974 was invalid on the grounds: (1) that the Notice of October 25, 1973[4] had been constructively terminated prior to February 21, 1974, by intervening events, and (2) that the rule of February 21 could not legally be made effective October 25, 1973.

Petitioners' Statement of the Case needs amplification in several respects material to their contentions.

Petitioner California states (p. 10) that the CLC never took any action pursuant to the Notice of Octo-

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[3]Federal price controls operate in such a manner as to prevent refiners from pocketing the cost savings as profits (39 F.R. 12254).

[4]On October 25, 1973, the Cost of Living Council ("CLC") issued a Notice of Proposed Rule Making, to be effective October 25, 1973, if adopted (38 F.R. 29618-19). On December 26, 1973, the CLC delegated to the newly created Federal Energy Office ("FEO") authority to act upon outstanding matters initiated by the CLC (39 F.R. 24). On February 21, 1974, the FEO adopted the proposed rule, effective as of October 25, 1973 (39 F.R. 7176-77).

ber 25, 1973. That is a true but incomplete statement. Petitioners neglect to include in their otherwise detailed Statement of the Case any reference to Delegation Order No. 47 (December 26, 1973)[5] by which the CLC delegated to the FEO its responsibility for price regulation of petroleum products and expressly confirmed and ratified "all orders, regulations, circulars or other directives issued and all other actions taken" by the CLC and provided that all such matters should remain in full force and effect unless or until altered, amended or revoked by the FEO.[6]

Petitioner State of California recites in its Statement of the Case (p. 11): "The summary preceding the January 14 regulations (39 F.R. 1924) stated '. . . no specific future changes [in the regulations] are currently anticipated,' but did invite comments upon the entire complex system for allocation and pricing set forth in the regulations." The partial sentence quoted by the State of California is taken out of context, and the reference to "allocation and pricing" is a bit of editorializing. The full text of this FEO announcement is set out in the Appendix to California's Petition, pages 96 to 98.[7] The significance of the out-of-context quote

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[5]39 F.R. 24, January 2, 1974; App. to Calif. Pet., pp. 91-93.

[6]At a later point in its brief ("Argument", p. 15), petitioner State of California does refer generally to the transfer of authority, describing it as an intervening circumstance which would cause them to believe that the Notice had been terminated.

[7]Basically, the announcement recited the authority for the regulation, the recent history, the fact that there had been a substantial revision to the allocation provisions, that the price provisions previously incorporated by reference to CLC regulations were now recodified and set forth in the same title as the allocation regulations, followed by the specific sentences here referred to. "Due to the fact that a substantial revision of the regulatory scheme has occurred and the Federal Energy Office realizes that unanticipated problems with the regulations will

and the editorializing is illustrated by the following discussion from the Opinion of the Court of Appeals (App. to Calif. Pet., pp. 15-16):

> "The appellees extract from the January 14, 1974, order the phrase '. . . although no specific future changes are currently anticipated . . .' and argue that this warranted the assumption on their part that the change contemplated by the pending rule making proceeding had been abandoned. This disregards the preceding sentence stating that 'a substantial revision of the regulatory scheme has occurred and the Federal Energy Office realizes that unanticipated problems with the regulations will surely arise.' There had been a substantial revision as to allocation provisions but not as to prices."

I

The Decision of the Court of Appeals Was Correct.

A. The Notice of Rule Making Was Not Terminated by Intervening Events.

The first Question Presented by both Petitioners (Calif. Pet., p. 4; La. Pet., p. 3)[5] is their contention that the rule-making proceeding initiated by the Notice of October 25, 1973, was terminated on or before January 14, 1974, as a result of intervening circumstances.

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surely arise, the Federal Energy Office is inviting comment on these regulations. Although no specific future changes are currently anticipated, the Federal Energy Office would appreciate all comments or suggestions which might assist in future changes to the program."

[5]Louisiana frames the first issue generally, in terms of whether or not the rule of February 21, 1974, was valid; but the underlying contention is the same. "It is the position of the State of Louisiana that the notice of October 25, 1973 was no longer viable when the FEO issued its rule of February 21, 1974." (Pet., p. 9.)

This issue was identified by the Court of Appeals (Opinion, p. 2) and Petitioner California (Pet., p. 14) as the decisive issue of the case; we concur.

Petitioners cite no legal authority for their proposition of an implied or constructive termination. Instead, they point to circumstances by which they "reasonably concluded" that the rule-making process was at end. For purposes of discussion below, we group these "intervening" circumstances cited by Petitioners as follows: (1) the four-month time interval between the Notice of October 25, 1973 and the Rule of February 21, 1974; (2) the FEO regulations and announcement of January 14, 1974; and (3) other circumstances.

Petitioners complain of the four-month time lag between the Notice of October 25, 1973 and the adoption of the rule on February 21, 1974, arguing in effect that the Notice expired with the passage of time. Petitioner State of Louisiana states the case as follows: "If this position were to be sustained then it would appear that an administrative agency could issue one Notice of proposed rule making and then issue rules based on that Notice for months and even years thereafter, a result which could of course not be sanctioned" (La. Pet., p. 7). The hyperbole helps to demonstrate the fallacy of their argument. "Years" are not involved; and we suggest that "months" are quite normal in an administrative rule-making process.[9] With respect to the four-month time period here in question, one month was consumed by the solicitation of comments (October 25, 1973, to November 24, 1973). Three days later, the Emergency Petroleum Allocation Act was enacted.

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[9]The Administrative Procedure Act (5 U.S.C. § 553) requires notice and an opportunity to comment before the adoption of a regulation.

During the next one and one-half months plus (November 27, 1973 to January 14, 1974), working under a Congressional deadline, a new agency was formed and complex petroleum allocation regulations were developed and promulgated. Simply stated, the problem posed by Petitioners' contention is not present in this case. As to the general proposition of how long a notice of proposed rule making remains viable where the agency has not acted, the Court of Appeals stated:

> "No case has been called to our attention, nor can we find any, which applies a doctrine of constructive termination of a rule making proceeding after its express termination by final decision of the responsible agency with the result of reversing the effect of that express determination contrary to the findings and intent of the agency. This is not to say that under some circumstances bad faith, basic unfairness or unconscionable delay could not justify a different result. Such were not present here." (Opinion, pp. 13-14 of App. to Calif. Pet.).

Petitioners contend that the FEO actions of January 14, 1974, caused them to assume that the Notice of October 25, 1973 was no longer viable and that the FEO had made a final decision to retain the exemption (Calif., p. 11; La., pp. 9-10). Specifically, they point to the fact that the price regulations published on that date contained the exemption and the fact that the accompanying announcement stated in part, ". . . no specific future changes are currently anticipated . . ." (App. to Calif. Pet., pp. 96-98). The partial sentence they quote is out of context.[10] The regulations of

[10]Discussed *supra*, at note 7.

January 14 were based on a Notice of proposed rule making issued on December 12, 1973[11]—not on the Notice of October 25, 1973. On January 14, no mention was made of the Notice of October 25, 1973, or the subject matter thereof.[12] There was no discussion of the exemption, nor any other indication that the question of whether or not there should be an exemption had been considered or acted upon. The price regulations were described only as a republication of the regulations in a different section of the Code for convenience. The States did not inquire of the agency whether the rule-making proceeding had been abandoned (Opinion, p. 16 of App. to Calif. Pet.). When their "assumption" was subsequently brought to the attention of the FEO, the agency stated that it did not, on January 14, 1974, intend to act upon the Notice of October 25, 1973 (39 F.R. 12252-53).

The other intervening circumstances alleged by Petitioners, including the adoption of the Emergency Petroleum Allocation Act and an increase in the disparity between ceiling and exempt prices, were circumstances which weakened rather than strengthened the position of Petitioners that the exemption should be continued.[13] In its rulings of February 21, 1974, and April 2, 1974, these were circumstances cited by the

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[11]"The purpose of this amendment is to revise Chapter II of Title 10 of the Code of Federal Regulations. A notice of proposed rulemaking containing a Proposed Mandatory Petroleum Products Allocation Program was issued on December 12, 1973." (39 F.R. 1924).

[12]The first time after its issuance that the Notice of October 25, 1973 was mentioned was on February 21, 1974, when the FEO expressly cited it as authority for the adoption of the rule of that date.

[13]Discussed in Opinion (p. 15, App. to Calif. Pet.).

FEO as reasons for the removal of the exemption.[14] The transfer of authority from the CLC to the FEO, cited by California at page 15 as a circumstance which caused them to believe that the Notice had been terminated, contained an express provision that outstanding matters were not terminated by the transfer.[15]

B. The Federal Energy Office Did Not Err in Making the Rule Effective October 25, 1973.

When the FEO adopted the rule on February 21, 1974, they made it effective as of October 25, 1973. Both Petitioners contend (Calif. Question 3, p. 4: La. Question III, p. 3) that this was retroactive rule making and therefore invalid, citing cases regarding retroactive rule making.

But we are not concerned with retroactivity in the usual sense. It is on this basis that the cases cited by Petitioners are distinguishable. Involved here were prices which from the very inception of the rule-making pro-

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[14]One of the specific purposes of the Emergency Petroleum Allocation Act was to protect the competitive viability of the independent refiner and marketeer (39 F.R. 7177); the disparity between ceiling and exempt prices meant that a class of refiners purchasing predominantly exempt oil from the states would not be able to compete effectively with major oil companies owning or controlling large amounts of private, price-controlled oil (39 F.R. 12253-54).

[15]The transfer of authority was accomplished by two documents. On December 4, 1973, E.O. 11748 (38 F.R. 33575-76, Dec. 6, 1973) established the FEO, delegated to it authority under the EPAA and the ESA, and directed further delegations of authority from the CLC to the FEO. On December 26, 1973 (Delegation Order No. 47, 39 F.R. 24, January 2, 1974), the CLC delegated to the FEO its responsibility for price regulation of petroleum products and expressly confirmed and ratified "all orders, regulations, circulars and other directives issued and all other actions taken" by the CLC and provided that all such matters should remain in full force and effect unless or until altered, amended or revoked by the FEO.

ceeding could be regarded as conditional. The rule-making process was an ongoing one and the October 25, 1973, Notice clearly stated that the change, if made, would be effective as of said date.

Assuming that there was retroactive application, the rule still does not necessarily fail. The Court of Appeals, citing the "balancing" test of *SEC v. Chenery*, 332 U.S. 194 (1947),[16] held that this was not the type of retroactivity condemned by law. Typical retroactivity questioned but accepted in the cases has involved situations where there was no advance notice, unlike the situation involved here. This situation involves few, if any, of the problems of retroactive regulation generally. "In any event, the effective date of the rule in question is not only fair and reasonable but well designed to advance legitimate statutory and administrative policies." (Opinion, p. 18, of App. to Calif. Pet.).

With respect to the "30 day" argument raised by Petitioners (Calif. Pet., pp. 23-24; La. Pet., pp. 10-11), the Court of Appeals held that there were cogent reasons for the withdrawal of the exemption as of the date of the Notice (Opinion, pp. 18-19 of App. to Calif. Pet.). In its ruling of February 21, 1974, the FEO made specific findings regarding the adverse impact of the exemption upon the national distribution system and stated that the rule was made effective that date because the Notice of October 25, 1973, had explicitly provided that the rule, if ultimately adopted, would apply to all deliveries occurring after that date (39 F.R. 7176-77).

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[16] "[R]etroactivity must be balanced against the mischief of producing a result which is contrary to the statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law." 332 U.S., at 203.

C. The Court of Appeals Did Not Overturn the District Court's Findings of Fact.

Petitioner State of Louisiana contends (pp. 18-19) that the Court of Appeals overturned the District Court's Findings of Fact. Throughout these proceedings in both courts, there has been no dispute as to the facts[17]—only as to the legal conclusions to be drawn from uncontested facts. The so-called "Findings of Fact" were prepared by Petitioner's attorneys at the direction of the District Court.[18] The Court of Appeals stated, "Where they are in conflict with the views herein expressed they are either not findings of fact at all, or mixed findings of fact and conclusions of law made under an erroneous view of controlling law, as to which the effect of the clearly erroneous rule is dissipated. [Citing cases]" (Opinion, p. 20 of App. to Calif. Pet.).

D. There Are Alternate Grounds in Support of the Court's Decision.

Before the Court of Appeals, these Amici asserted alternate grounds in support of the Court's ultimate decision. The Court reserved ruling on them in view of its ruling that the termination of the exemption by the FEO was valid (Opinion, note 5, at p. 4 of App. to Calif. Pet.).

These alternate grounds in support of its decision which the Temporary Emergency Court of Appeals did not rule upon were basically as follows. Even if the

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[17]The injunction granted by the District Court was based on uncontroverted affidavits; there was no formal trial (Opinion, p. 9 of App. to Calif. Pet.).

[18]District Court Opinion, p. 28 of App. to Calif. Pet.

termination of the exemption were invalid, the rule of January 14, insofar as it purported to exempt State and local governments from price controls, was itself invalid: (1) because the announcement of January 14 did not contain a concise general statement of the basis and purpose for the exemption, as required by Section 553(c) of the Administrative Procedure Act; and (2) because subsections (a), (e), and (g) of Section 4 of the Emergency Petroleum Allocation Act preclude any exemptions to the regulations other than those provided in 4(e)[19] or those added by the amendment procedure of 4(g)(2), a procedure which was not followed.[20]

In further support of the Court's decision, subsection (d) of Section 211 ("Judicial Review") of the Economic Stabilization Act provides that no regulation of the CLC or the FEO shall be set aside unless a final judgment determines that the regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in Section 706(2) of Title 5, U.S. Code. Section 706 does allow a court to set aside an agency regulation on procedural grounds, but it also provides that in so doing, the reviewing court shall take due account of the rule of "harmless error". Thus, even if the Notice of October 25 had been terminated, the error was harmless in view of the opportunities afforded to Petitioners to submit their comments, both before and after the

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[19]Section 4(a) provides that the price regulations shall apply to all sales of crude oil except as provided in subsection (e). Subsection (e) provides for one mandatory and one discretionary exemption, neither of which is applicable here.

[20]Even if available, the amendment procedure of 4(g)(2) requires a series of findings by the agency and a period of review by Congress before the exemption can become effective.

rule of February 21, 1974.[21] The Court of Appeals, having determined that the Notice had not been terminated, stated that it was not necessary to rule upon this contention (Opinion, p. 11 of App. to Calif. Pet.).

II

There Is No Conflict of Decision.

There is no conflict of decision on the issues here involved, *i.e.*, whether or not the Notice of rule making had been terminated, and whether or not the regulation was unlawfully retroactive.

Petitioner California (Pet., p. 4) cites only a conflict in principle, *i.e.*, an alleged "conflict with the decisions of this Court and other Federal Courts in its interpretation of the fundamental rights conferred upon those affected by administrative regulations under the Administrative Procedure Act."

At page 6, Petitioner Louisiana alleges that this decision is in conflict with other decisions of other Federal Courts of Appeals and of the United States Supreme Court. Significantly, they do not cite the other cases alleged to be in conflict.

III

There Is No Important Question of Federal or State Law.

Petitioner Louisiana (Pet., p. 6) alleges, "Moreover, the case involves an important state question as well as an important question of federal law which has not been, but should be settled by this Court, all within the contemplation of Rule 19(b) of the rules of this

[21]In a different context, the Court of Appeals said, "There is simply no indication that any significant arguments were withheld or disregarded or that the appellees were unfairly treated." (Opinion, pp. 16-17).

Honorable Court." They do not identify, and we are unable to locate in either petition, the important question of federal or state law.

Both Petitioners (Calif. Pet., p. 4; La. Pet., p. 21) do allege the importance of the issue in terms of the dollar amount of the revenues lost by the states because their exemption was not continued. The Temporary Emergency Court of Appeals stated (Opinion, p. 16), "On no theory did appellees have a vested right to a continuation of the preferential treatment." These oil producing states, like other private producers of crude oil, already receive $1.35 per barrel more for their oil than they received prior to the imposition of the Phase IV price controls. At issue is an additional $5.00 per barrel surcharge which the FEO found would represent "windfall revenues" to these states.[21]

IV

The Question Presented Is Unique and Not Likely to Recur.

Petitioner State of California prefaces its description of the Questions Presented with, "Because of the unique character of this case, a short general summary of the facts is necessary to convey the significance of these specific questions presented for review." (p. 2).

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[21]"Certain government units have urged that removal of the exemption would deprive them of added revenues. The FEO has concluded, however, that substantial additional revenues have already been realized by State and local governments from royalty crude oil due to the increases in the crude oil ceiling prices pursuant to the provisions of Subpart D of 10 CFR Part 212. The FEO believes that the still further revenues obtainable through the sale of crude oil at uncontrolled prices would represent, in effect, windfall revenues for those State and local governments having crude oil interests, at the expense of the adverse impact on the overall objectives of Act, as discussed above." 39 F.R. 7177. By contrast, the FEO found that the elimination of the exemption would not result in windfall profits to refiners. 39 F.R. 12254.

One and one-half pages later, Petitioner State of California then frames its first Question as "1. Whether, *under the aforesaid circumstances*, the Federal Energy Office had already terminated the rule making process (etc.) . . ." (Emphasis added).

This narrow issue is the one identified by the Court of Appeals (Opinion, p. 2 of App. to Calif. Pet.) and Petitioner State of California (Pet., p. 14) as the decisive issue of the case.

The Court of Appeals stated, "We think the appellants are right in saying that but for unique circumstances which caused FEO to promulgate a massively complex allocation scheme and hold the issue of State and local government price exemption in abeyance until the issues could be approached in a conscientious manner, this controversy never would have arisen." (Opinion, p. 13 of App. to Calif. Pet.).

Where the question presented is unique on its facts and not likely to recur, its precedent-setting value is minimal, and this is a further reason why this Court should deny the Petitions for Writ of Certiorari.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-171

STATE OF LOUISIANA, PETITIONER

v.

JOHN C. SAWHILL, ET AL.

No. 74-181

THE PEOPLE OF THE STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

JOHN C. SAWHILL, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals (California Pet. App. A, pp. 1-21; Louisiana Pet. App. D, pp. 33a-52a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1974.[1] The petitions for writs of

[1] The court of appeals' decision was rendered from the bench on July 26, 1974 (Louisiana Pet. App. C, p. 32a). The opinion and judgment were filed on August 12, 1974,

certiorari were filed on August 23 and August 26, 1974, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254. See Section 5(a), Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 633.

QUESTIONS PRESENTED

1. Whether the Federal Energy Office terminated rule-making proceedings initiated by the Cost of Living Council thereby invalidating regulations removing the exemption from price controls for state and local government sales of petroleum and petroleum products.

2. Whether such regulations may be applied to transactions occurring before the date of adoption of the regulations, where the notice of proposed rule-making provided for an earlier effective date.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended, 85 Stat. 743, 87 Stat. 27, and the Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 627, are set forth in the Appendix to the petition filed by the State of California.

Regulations of the Cost of Living Council and the Federal Energy Office, the Executive Order delegating authority to the Federal Energy Office, and the delegation of authority from the Cost of Living

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and on August 14, 1974, the judgment was modified to make its effective date July 26, 1974 (Louisiana Pet. App. E, p. 53a).

Council to the Federal Energy Office are also set forth in the Appendix to the California petition.

STATEMENT

The issues presented in this case concern the Federal Energy Office's withdrawal of the exemption from price controls of state and local government sales of petroleum and petroleum products. Petitioners do not challenge either the authority of the Federal Energy Office to withdraw the exemption or the merits of its decision to do so; rather, they contend that the regulations removing the exemption were invalid because of certain alleged procedural deficiencies. Since petitioners' primary claim relates to the procedures followed in adoption of the regulations, the events leading to the adoption are set forth in detail below.

1. The Rule-Making Proceedings

On August 9, 1973, the Cost of Living Council issued regulations generally exempting state and local governmental units from price controls under the Economic Stabilization Act. 6 C.F.R. 150.54(a) (38 Fed. Reg. 21601). This exemption was applicable to sales of petroleum and petroleum products which were otherwise subject to price controls. 6 C.F.R. 150.351, *et seq.*

The advent of the "October War" in the Middle East and the attendant boycott by Middle East countries of crude petroleum sales to the United States resulted in a contraction of available supplies

of crude petroleum. Fearing that these events would directly affect domestic prices for petroleum products, on October 25, 1973, the Cost of Living Council published a Notice of Proposed Rule-Making for the purpose of removing the exemption of state and local government sales of petroleum from price controls (38 Fed. Reg. 29618). Interested persons were invited to file written comments by November 24, 1973. The notice further stated that if the proposed regulation were adopted, it would be effective as of October 25, 1973, the date upon which the Notice was filed with the Federal Register.

On November 27, 1973, after the close of the period for receipt of comments but before action had been taken on the proposed regulation, Congress enacted the Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 627. The Act required the issuance of regulations to control prices and allocate supplies of petroleum products within 15 days of enactment.

On December 4, 1973, the President, pursuant to authority conferred by the Emergency Petroleum Allocation Act, created the Federal Energy Office (FEO), and delegated to it all authority vested in him by the Act. In addition, the President delegated to FEO the authority vested in him by Section 203 (a)(3) of the Economic Stabilization Act. The President also directed the Chairman of the Cost of Living Council (CLC) to delegate to the Administrator of FEO "such authority under the Economic Stabilization Act as may be necessary to carry out

the purposes of that Act with respect to energy matters." Executive Order 11748, 38 Fed. Reg. 33575.

On December 11, 1973, FEO issued proposed regulations as required by the Emergency Petroleum Allocation Act. 38 Fed. Reg. 34414, *et seq.* These proposed regulations simply adopted by reference the prevailing CLC price control regulations. See 38 Fed. Reg. 34434.

On December 26, CLC formally delegated its petroleum pricing authority, including the rule-making proceeding initiated on October 25, 1973, to the FEO (39 Fed. Reg. 24).

On December 27, the Federal Energy Office published revised Mandatory Fuel Allocation Regulations (39 Fed. Reg. 744, *et seq.*). The CLC price control regulations remained unchanged "except to the extent inconsistent with price regulations in this chapter" (39 Fed. Reg. 761). The new allocation regulations were to be implemented on January 15, 1974; the price rules were simply to remain in effect.

On January 14, 1974, the FEO issued revised Petroleum Allocation and Price Regulations (39 Fed. Reg. 1924, *et seq.*) which superseded the December 27, 1973 regulations. To avoid confusion, the new regulations were issued as a recodification so that newly-numbered provisions would not be confused with old proposals. Part 212 of the new regulations which concerned price regulations republished in full the existing Cost of Living Council regulations (39 Fed. Reg. 1924). The effect of republication was to transfer the petroleum pricing regulations from Title 6 of the Code of Federal Regulations (Economic

Stabilization) to Title 10 (Energy) so that "[p]ersons subject to the price and allocation regulations will now be able to have a single readily available source of information as to the rules established to govern this program" (39 Fed. Reg. 1924). Section 212.52(b) continued the state and local government exemption. Having completed the issuance of regulations as required by the Emergency Petroleum Allocation Act, the Federal Energy Office stated that "no specific future changes are currently anticipated * * *." *Ibid.*

On February 21, 1974, the FEO, acting on the rule-making proceedings initiated by the notice of October 25, 1973, announced the removal of the exemption from price controls for state and local governments effective October 25, 1973 (39 Fed. Reg. 7176). The FEO found that the exemption, if not removed, "would tend to have a disruptive impact on the national distribution system" (*ibid.*). It also became apparent from the comments received that

> * * * much of the crude oil sold by State and local governments is purchased by small independent refiners which, if they are required to pay the substantially higher prices now obtainable for uncontrolled crude oil, may experience severe competitive harm. Thus, although the relative quantity of crude oil involved is small, the effects of the exemption are focused on a particular segment of the industry, and the preservation of the competitive viability of small and independent refiners, which is a specific objective of the Act, would not be adequately ac-

complished unless the exemption is removed. [*Id.* at 7177.]

On March 5, 1974, in response to objections from several states, the FEO issued a notice of proposed reconsideration of the February 21 decision (39 Fed. Reg. 8996). A hearing was scheduled for March 13, 1974, and the public was invited to submit written comments in lieu of or in addition to oral presentation until 5:00 p.m., March 15, 1974.

On March 13, 1974, the hearing was held at the offices of the Federal Energy Office in Washington, D.C. Representatives of the States of California, Louisiana and Texas appeared and submitted oral testimony. On April 2, 1974, the FEO found that the evidence submitted reconfirmed its February 21, 1974 decision to withdraw the exemption of State and local government sales of covered petroleum and petroleum products (39 Fed. Reg. 12252).

2. The District Court Proceedings

Petitioner State of California filed this action on March 13, 1974, the date on which the FEO held the hearing on the proposed reconsideration of removal of the exemption. Petitioner State of Louisiana was permitted to intervene and on March 20, 1974, the district court granted petitioners' application for a temporary restraining order prohibiting enforcement of price controls with respect to California and Louisiana.

On May 1, 1974, after the FEO had reconfirmed its determination to withdraw the exemption, the dis-

trict court held the withdrawal invalid (Louisiana Pet. App. A, pp. 1a-7a). The court found that the FEO had terminated the rule-making proceedings initiated by the Cost of Living Council when it republished regulations preserving the exemption on January 14, 1974 (*id.* at 3a). Alternatively, the court held that the removal of the exemption, even if otherwise valid, could not be applied retroactively (*id.* at 4a-6a). The district court's findings and conclusions in support of its opinion were subsequently filed on May 28, 1974 (Louisiana Pet. App. A, pp. 9a-28a).

3. The Court of Appeals Proceedings

The court of appeals granted the government's request for a stay of the district court's order pending appeal, and on July 26, 1974, after oral argument, the court of appeals, in a ruling from the bench, reversed. The court of appeals indicated that its opinion would be filed subsequently and further explained that this unusual procedure had been employed because the amount in controversy was increasing at the rate of $1.2 million per day and "[t]he legal uncertainty surrounding these payments is injurious to the interests of all parties as well as third party small independent refiners who have accrued potential liabilities to the states" (Louisiana Pet. App. D, p. 41a, n.17).

The court of appeals opinion was filed on August 12, 1974. The court held that the "intervening transfer of authority from CLC to FEO and the sub-

sequent republication of price control regulations by FEO in a different section of the Code of Federal Regulations * * *" did not terminate the rule-making proceeding (Louisiana Pet. App. D, p. 44a). With respect to the issue of possible retroactivity, the court found "the effective date * * * is not only fair and reasonable but well designed to advance legitimate statutory and administrative policies" (*id.* at 50a).

ARGUMENT

1. Petitioners' primary contention is that the FEO's removal of the exemption from price controls of state and local government sales of petroleum products violated the notice and comment requirements of the rule-making provisions of the Administrative Procedure Act, 5 U.S.C. 553. Specifically, petitioners contend that the FEO's issuance of regulations on January 14, 1974, terminated the rule-making proceedings initiated by the CLC on October 25, 1973, and thus, the February 21, 1974 decision to remove the exemption was made without publication of notice and opportunity for public comment as required by 5 U.S.C. 553.

This issue was resolved adversely to petitioners' contentions by the court of appeals. There is no occasion for further review of this narrow issue which arises from the peculiar facts of this case.

In any event the court of appeals correctly held that there was no termination of the rule-making proceedings initiated by CLC. As the court of appeals found (Louisiana Pet. App. D, p. 44a):

> In the republication of January 14, 1974, upon which appellees principally rely, there was no discussion of FEO's consideration of the exemption in question, nor was there incorporated a general statement of the purpose for the exemption on the theory that republication was intended as a determination of the rule-making proceeding.

The court of appeals recognized that the "unique circumstances" which required FEO to promulgate a "massively complex petroleum allocation scheme" had resulted in deferral of action on the exemption (*id.* at 45a), and the court concluded that FEO "was entitled to reasonable leeway in the gale of congressional deadline while it assumed charge of the regulatory structure before being required to complete the repair initiated by CLC" (*ibid.*).

The court of appeals noted that evidence of bad faith, unfairness, or unconscionable delay might justify a contrary result but that no such evidence had been offered in this case (Louisiana Pet. App. D, p. 45a). Petitioners' contention that they were entitled to assume that the rule-making proceeding had been abandoned is unsupported by the record; indeed, as the court of appeals found, the "claim of good faith reliance takes on a somewhat hollow, if not artful, sound in view of information elicited during oral argument that at no time prior to actual withdrawal of the exemption did any of [the petitioners] so much as inquire of the agency whether the rule-making proceeding looking toward the withdrawal of

the exemption had, indeed, been abandoned" (*id.* at 48a).[2]

2. Petitioners also maintain that, assuming the validity of the removal of the exemption, it cannot be applied retroactively (Louisiana Pet. 10-17; California Pet. 25-29). As the court of appeals noted, retroactivity claims typically involve absence of notice and here the CLC rule-making proceedings included notice that the removal of the exemption would, if adopted, apply to sales occurring after October 25, 1973. Since the removal of the exemption applies only to transactions occurring after the notice date, its application cannot be characterized as retroactive.

Even if, however, application of the removal to transactions occurring after the notice date is deemed retroactive, such an application is valid. In *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, this Court adopted the following general test with respect to the retroactive application of agency action (332 U.S. at 203):

> [R]etroactivity must be balanced against the mischief of producing a result which is contrary

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[2] Petitioners' suggestion that changed circumstances since the close of the period for comments in the rule-making proceeding vitiated the subsequent withdrawal of the exemption is also without merit. Petitioners were afforded an opportunity to submit comments on March 13, 1974, in the reconsideration hearing, and it is apparent that changed circumstances—such as the three-fold increase in the uncontrolled price of oil and the enactment of the Emergency Petroleum Allocation Act of 1973—confirmed the need for removal of the exemption. See 39 Fed. Reg. 12252.

> to a statutory design or to legal or equitable principles. If that mischief is greater than the ill effect of retroactive application of a new standard, it is not the type of retroactivity which is condemned by law. See *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 620.[3]

The FEO found that the exemption created a disruptive impact on the national petroleum distribution system, injured the competitive position of small and independent refiners, and disrupted historic supply patterns—results which were contrary to the goals of the Emergency Petroleum Allocation Act. 39 Fed. Reg. 12252, *et seq.*

Petitioners do not challenge these findings; rather they assert simply that retroactive application would be unfair because it would deprive states of income which they would otherwise receive. Although petitioners will necessarily receive less than the uncontrolled price, they are treated no differently in this

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[3] *Chenery* involved the retroactive application of an order entered in adjudicatory proceedings. The test adopted by this Court is, however, equally applicable to regulation, as shown in *Addison* v. *Holly Hill Co.*, 322 U.S. 607, cited by this Court in *Chenery*.

Petitioner California's reliance on *National Labor Relations Board* v. *Majestic Weaving Co.*, 355 F.2d 854 (C.A. 2) is misplaced. *Majestic* merely recognizes the general rule that ordinarily rule-making rather than *ad hoc* adjudication should be utilized by agencies to establish new standards. Here the Federal Energy Office utilized its rule-making powers and while regulations are ordinarily given only prospective effect, as shown in the text, retroactive application is appropriate in circumstances such as those present in this case.

regard from other domestic producers of petroleum and petroleum products.

Moreover, the court of appeals' opinion indicates (Louisiana Pet. App. D, pp. 48a, 50a) and, we have been informed by the Federal Energy Administration, that since October 25, 1973, the states have billed customers at the uncontrolled price but, except for isolated instances, have collected only the controlled price.[4] Thus, the hardship which would arise upon the refund of previous collections of substantial sums is not present in this case.

If collection of the uncontrolled price billings were permitted, the goals of the Emergency Petroleum Allocation Act would be nullified; accordingly, the court of appeals properly upheld the application of FEO's removal of the exemption to transactions occurring after October 25, 1973.[5]

3. Finally, petitioners argue that the withdrawal of the exemption cannot be applied to transactions which occurred prior to the date of adoption of the regulation because the Federal Energy Office failed to

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[4] Petitioner Louisiana asserts that "certain" amounts were collected at the uncontrolled price (Louisiana Pet. 17). The affidavit to this effect relied upon by Louisiana does not indicate the precise amount of such collections (see R. 139-142), and the record shows that a demand for payment at the uncontrolled price was not sent to Louisiana's customer until January 30, 1974 (R. 143). Thus, at best such payments, if any, were made only during the period January 30, 1974 to February 21, 1974.

[5] We have been informed by the Federal Energy Administration that accrued but uncollected billings at the uncontrolled price now exceed $250 million.

comply with the 30-day requirement of 5 U.S.C. 553 (d). Section 553(d) requires publication or service of a substantive rule "not less than 30 days before its effective date, except * * * as otherwise provided by the agency for good cause found and published with the rule." The FEO rule contained no express finding of good cause; however, as the court of appeals found (Louisiana Pet. App. D, p. 50a):

> [F]rom the reasons and purposes * * * assigned for the withdrawal of the exemption itself, and the very nature of the entire proceeding in context with the Economic Stabilization Act and the Emergency Petroleum Allocation Act, the cogent reasons for the withdrawal of the exemption as of the date of the initial notice were quite obvious. Under such circumstances any flaw was at most purely technical, being neither prejudicial nor invalidating.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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